

P R O C E E D I N G S

JUDGE NIEMEYER: Be seated, please. All right.

This morning we've got the case of Benisek versus Lamone. And we're on cross motions for summary judgment. And I think it best that we start out with the plaintiffs. They filed a motion for summary judgment. And then the State has filed a cross motion for summary judgment. And we've received your papers. We've read your papers, studied them. And so we're ready to hear you out now.

Mr. Kimberly.

MR. KIMBERLY: Thank you, Your Honor. It's good to be back. So I think --

JUDGE BREDAR: Mr. Kimberly, have you tried to settle this case?

MR. KIMBERLY: No, Your Honor. We have not attempted to settle.

JUDGE BREDAR: If the plaintiffs were able to achieve, through a settlement, the creation of a nonpartisan commission in Maryland that would be responsible for drawing the lines going forward, that would meet all of the requirements and complaints that your clients have presented to the Court; wouldn't it?

MR. KIMBERLY: Well, it certainly would, Your Honor. There's certainly no impediment from our perspective to a willingness to settle. We've simply read into the fairly

1 steadfast opposition to our position on the part of the office
2 of the Attorney General that that's not something that's on
3 the table from their perspective, but you'll have to ask
4 them.

5 JUDGE BREDAR: And the United States Supreme Court
6 has endorsed the lawfulness of such commissions, they did so
7 expressly in the Arizona case; true?

8 MR. KIMBERLY: True. We would be very pleased to
9 see that development. Unfortunately, because it's a
10 development that requires legislation, it's not one that I
11 think we can compel by settlement. So it's something that I
12 think would fall to the State to undertake. I think if such a
13 commission were formed and it redrew the present map, that's a
14 process we'd be happy to be involved in and it may well moot
15 our case, but we haven't certainly been given any suggestion
16 that that's something that the State Legislature or the
17 Governor's Office is considering.

18 JUDGE BREDAR: So you're completely open to it, but
19 you need to see some indication from your opponent, the State
20 of Maryland, that they would similarly be open to at least a
21 dialogue around the possibility of a settlement. Of course,
22 it's not for the Court to dictate what those terms would be,
23 but that's one possibility.

24 MR. KIMBERLY: I guess the way that I view it, Your
25 Honor, is that I'm doubtful, in fact, that it could be

1 accomplished via a settlement, I think what it might be is
2 intervening conduct that ends the conduct complained of. But
3 our settlement, at least vis-a-vis this lawsuit, would have to
4 be with the State Board of Elections and its leaders.

5 JUDGE NIEMEYER: Why couldn't it be a consent order
6 by the Court?

7 MR. KIMBERLY: It could be a consent order or much
8 like the sort --

9 JUDGE NIEMEYER: I mean, to take it out of the
10 political process. In other words, the commission would be an
11 adjunct of the Court, and the parties would participate and it
12 would be done by consent order in the context of this case, as
13 opposed to having to go back to the legislature. That's just
14 a thought, spontaneous.

15 MR. KIMBERLY: I appreciate that, Your Honor. And
16 if there were such a consent order that indicated that the
17 State would not enforce the map as drawn, and instead would
18 enact or promulgate a map neutrally drawn --

19 JUDGE NIEMEYER: We might make findings in the
20 consent order and have the agreed upon -- the commission
21 lines, if they were changed, adopted as part of the Court's
22 order directing that it govern the next election.

23 MR. KIMBERLY: I think that would -- presuming the
24 lines of that map were consistent with our legal theory, and I
25 gather --

1 JUDGE NIEMEYER: Well, that would be something for
2 that little commission and you guys to work out if that were
3 the course that we were going on. But probably you have a lot
4 more flexibility than the state. The State would have to
5 consider something like that too, at some length. And I think
6 these inquiries or suggestions are not efforts to push one
7 direction or the other, these are just ideas to get around
8 hurdles.

9 MR. KIMBERLY: I appreciate that and I would say we
10 are indifferent to -- our goal is reaching an end result where
11 we have a neutrally drafted map. We're indifferent to the
12 means of getting there. If it's a permanent injunction, that
13 would be great. If it's a consent order or some settlement by
14 which the State agrees to conduct elections under a neutrally
15 drawn map, we would be perfectly happy with that outcome as
16 well. Judge Niemeyer, as you suggest, I think the real
17 question as it concerns any of those alternative approaches
18 rests with my friends on the other side. And the State --

19 JUDGE NIEMEYER: Well, it takes two to tango. It
20 just means one may have to take the lead.

21 MR. KIMBERLY: Well, and I leave them to make the
22 argument. I think it is also a question of whether it would
23 have to be done by legislation or not, but maybe through
24 something like a consent --

25 JUDGE NIEMEYER: Why would that be done by

1 legislation if it's before the Court now on a constitutional
2 issue? In other words, it's a political question initially.
3 The requirements are shared by the State and the Congress in
4 drawing these lines. But the Courts are involved through
5 arguments that the lines that that process yielded violated
6 the Constitution. So there would have to be some basis for
7 the Court to keep something like that. And we recognize that
8 too.

9 The difficulty of saying the legislature has to pass
10 it, we can't dictate how the legislature would vote, number
11 one. And No. 2 the process probably becomes indeterminate and
12 we might find ourselves back at this --

13 MR. KIMBERLY: That's right.

14 JUDGE BREDAR: -- at the gate again, because there
15 have been efforts in the past to do something like that
16 voluntarily. The idea might be to have a court orchestrate a
17 settlement through --

18 MR. KIMBERLY: Certainly.

19 JUDGE BREDAR: -- through a court-created commission
20 and an approval with a consent order.

21 But any way that's just -- these are just ideas.
22 And I don't know if Judge Bredar had any other ways that he
23 was talking about it, but it sounds appetizing if both parties
24 were willing.

25 MR. KIMBERLY: Certainly. And I'll confess not to

1 having given a lot of thought to a question of a consent
2 decree. But as I say, our ultimate objective is ends-oriented
3 not means-oriented. And if there's another way of getting
4 there apart from a permanent injunction, we would certainly be
5 happy to entertain that possibility.

6 JUDGE BREDAR: So, Mr. Kimberly, I appreciate your
7 implicit acknowledgment that it's probably an easier call on
8 your side than it is on the other side. But by virtue of the
9 Court raising it with you, we provide your opponents the
10 opportunity to reflect for a few minutes on their answer to
11 what is probably a much more complex question.

12 MR. KIMBERLY: Certainly. Well, while they think
13 about that, if it's all right with --

14 JUDGE NIEMEYER: Why don't you turn to your
15 motion.

16 MR. KIMBERLY: I'll proceed to my motion. What I'd
17 like to do, Your Honors, is first lay out what it is we think
18 that we have to show. And then I'm going to -- well, why
19 don't I start with this. So the three elements, according to
20 this Court's decision on the motion to dismiss, is that we
21 have to show specific intent to burden Republicans by reason
22 of their party affiliation and past voting history; we have to
23 show that the redistricting, in fact, resulted in vote
24 dilution that was sufficiently significant that it actually
25 caused a practical consequence in the way that the electoral

1 machinery works; and finally, we have to show that the vote
2 dilution would not have come about absent the protected
3 conduct and the intent to burden that conduct. And we submit
4 we've proved all three elements.

5 Last time we were here on the preliminary injunction
6 motion, we started out with a discussion of specific intent.
7 And the Court moved fairly quickly away from that. What I'd
8 like to do is just give a very brief sort of three minute
9 highlight reel of specific intent. And then I'm certainly
10 happy to answer any questions that the Court may have on that,
11 but I don't intend to dwell especially long on the question of
12 intent.

13 Throughout our briefing I think we -- and throughout
14 the record we've demonstrated that the goal in the 2011
15 redistricting was to move from a 6-2 map to a 7-1 map. Here
16 for example is Eric Hawkins the NCEC analyst, who consulted on
17 the map drawing who confirmed this intent.

18 (Video played.)

19 MR. KIMBERLY: That evidence does not stand on its
20 own. Later in his deposition, Mr. Hawkins confirmed again
21 that they were going to create a quote, "7-1 split," in their
22 approach to the redistricting in 2011. This was corroborated
23 in turn by many other members of the redistricting actors in
24 the redistricting process, including here Curt Anderson who's
25 giving a press interview after having been briefed on the

1 redistricting on October 17th, 2011.

2 (Video played.)

3 MR. KIMBERLY: So this confirms that the goal of the
4 redistricting was to create a 7-1 map that gave Democrats an
5 additional seat in the eight seat congressional delegation.

6 Now, as it turns out there were -- because it was a
7 6-2 map, the map drawers could have targeted either the 1st
8 District or the 6th District. Here Eric Hawkins, I'll spare
9 you the video, but Eric Hawkins confirms that there were two
10 districts you could look at based on what the line up was, he
11 says. And so this presents a question whether the map drawers
12 targeted the 1st District, which is predominantly Republican,
13 or the 6th District, which is predominantly Republican.

14 And here is Martin O'Malley confirming in the course
15 of his deposition that a decision was made to go for the 6th.

16 (Video played.)

17 MR. KIMBERLY: And what this reflects is a decision
18 to crack the Republican majority in the 1st District would
19 have required drawing the 1st District in such a way that it
20 jumped the Chesapeake Bay. The map drawers and others
21 involved in the process had decided, for political reasons,
22 that they didn't want to jump the Chesapeake Bay. And so as
23 Governor O'Malley here confirms, the decision, therefore, was
24 made to go for the 6th.

25 And, finally, here is Governor O'Malley confirming

1 that his intent, indeed, as the leader of the redistricting
2 process, was to make the 6th District more favorable for
3 Democrats.

4 (Video played.)

5 MR. KIMBERLY: Now, we have quite a lot more than
6 this. But as I mentioned, the last time that we were here the
7 Court indicated that Your Honors didn't have extensive
8 questions about the issue of intent. And Chief Judge Bredar,
9 you even suggested that at that point that we have proven
10 intent beyond -- beyond the need for a trial. That is
11 certainly our position and I stand ready to answer any
12 questions --

13 JUDGE NIEMEYER: On that issue he seems to have had
14 the affirmance of Justice Kagan.

15 MR. KIMBERLY: Certainly so. And obviously, there
16 was some push back at the hearing before the Supreme Court,
17 there was no push back on the question of intent, whatever
18 other issues there may have been push back on. We think that
19 the record here really does not present a genuine dispute as
20 to the objectives of those who were involved in the map
21 drawing.

22 JUDGE BREDAR: Does the proof of intent with respect
23 to voter dilution easily sort of slide over and also satisfy
24 whatever proof obligation you have on intent with respect to
25 your claim of associational injuries.

1 MR. KIMBERLY: As in does proof of an intent to
2 dilute offer proof of intent to impose those --

3 JUDGE BREDAR: Exactly.

4 MR. KIMBERLY: Yes, I think so. And it's because
5 those associational harms really grow out of the vote dilution
6 itself.

7 JUDGE BREDAR: Suppose, though, that we're not
8 focusing on vote dilution ultimately, but on injuries that
9 were sustained to associational rights that people have under
10 the First Amendment, is the proof on intent that you've got in
11 this record nonetheless sufficient to make out those claims as
12 well?

13 MR. KIMBERLY: I would say so for two reasons. The
14 first, and I'll get to this in greater depth when I start
15 talking about the question of burden and injury, is our
16 position is that those associational harms themselves, in
17 fact, as I mentioned, grow out of vote dilution. But even if
18 you didn't think of it that way and you thought of them as --

19 JUDGE BREDAR: I don't.

20 MR. KIMBERLY: -- an independent injury, there's no
21 question here that the intent was to make it more difficult
22 for Republicans to win and easier for Democrats to win. And I
23 would say even more than that, it was an intent to ensure that
24 a Democrat wins the 6th Congressional District. And certainly
25 one way to do that is to disrupt the associational activities

1 of Republicans by making it more difficult for them to recruit
2 support to their party, by making it more difficult to get
3 their base to turn out to elections, by making it more
4 difficult to raise money, so on and so forth.

5 We have evidence in the record, which I'll get to in
6 a little bit, showing just those kinds of harms. But I think
7 more generally at the intent stage, the evidence here is that
8 the intent was to make it a 7-1 district. And disrupting
9 association is part of bringing about this objective.

10 So I think that's a segue to the question now of
11 burden and intent. And as I say, I'm -- I've come prepared to
12 talk more about intent if Your Honors have any questions about
13 that element, beyond Judge Bedar, what we just discussed.

14 For now what I'd like to do is move on to burden.
15 And before getting to the evidence, I'd like to try to
16 reorient the Court to the legal theory as we understand it, to
17 what this Court had to say in its motion -- in its opinion on
18 the motion to dismiss as we understand it. The ultimate
19 question on burden is not whether or not we have shown that
20 every election has changed because the gerrymander. It is
21 instead whether we have shown a real and practical
22 diminishment of political opportunity. That is what vote
23 dilution is about. And that is, at least the principle theory
24 of harm that we've put forward, although, as I say, I'll get
25 to these associational harms as well.

1 JUDGE RUSSELL: Isn't the associational harm easier
2 to prove than the voter dilution?

3 MR. KIMBERLY: I think we have shown both beyond
4 genuine dispute. I think both are quite clear on the
5 record.

6 JUDGE RUSSELL: As a matter of law, though? We'll
7 get to that in a moment, but as a matter of law you've shown
8 the injury as opposed to the associational theory doesn't
9 appear to be much of a dispute or it may not be much of a
10 dispute that there were 10,000 voters that were taken from one
11 district and placed in another district, with the intent to
12 prevent them from associating with one another for the
13 purposes of supporting a particular party.

14 MR. KIMBERLY: That, Your Honor, that sounds exactly
15 right to me.

16 JUDGE RUSSELL: As opposed to winning or losing,
17 establishing winning or losing --

18 MR. KIMBERLY: Certainly.

19 JUDGE RUSSELL: -- by saying as a matter of law that
20 there are voters out there that we're going to presume are
21 voting in a -- based upon a historical pattern and statistics
22 are going to be voting in a particular way. But the
23 associational theory might be a little bit easier to prove
24 because it's established by taking out a certain block of
25 voters and replacing them with another block.

1 MR. KIMBERLY: I think -- I don't disagree with
2 anything that you've said. I would say that these are two
3 alternative paths.

4 JUDGE RUSSELL: Thanks.

5 MR. KIMBERLY: Thank you. I think these are two
6 alternative paths to getting to the same place, which is just
7 to show that the redistricting here had a real and practical
8 impact on the First Amendment rights of Republicans in the old
9 6th Congressional District. We're certainly not giving up on
10 the idea of vote dilution. And perhaps we can move to the
11 question of --

12 JUDGE RUSSELL: I didn't mean to disrupt you, but I
13 had a question as you were presenting your case, and -- but I
14 didn't want to disrupt your presentation.

15 MR. KIMBERLY: Well, I appreciate that, Your Honor.
16 I guess what I would say -- well, why don't I come back to the
17 question of vote dilution.

18 JUDGE RUSSELL: That's fine.

19 MR. KIMBERLY: We have slides also on the
20 associational injury. Let me talk briefly about that right
21 now, the associational injury, as my colleague pulls up that
22 slide. Sorry, just one moment, Your Honor.

23 JUDGE RUSSELL: Sorry, Mr. Kimberly, I threw you off
24 and I apologize for that.

25 MR. KIMBERLY: That's okay. Your Honor, ultimately

1 my goal is to convince you. So I'm happy to respond to your
2 questions.

3 So we -- as I said, we have two parallel arguments
4 here with respect to burden. And one is that there has been a
5 chilled political participation and a disruption of that
6 association. And I think at a certain level there is an
7 intuitive element to this that doesn't require a whole lot of
8 evidence or thought. Governor O'Malley put it succinctly in a
9 speech that he gave at Boston College.

10 (Video played.)

11 MR. KIMBERLY: The idea that redistricting by
12 cracking majorities, and attempting to rig elections by making
13 it impossible, Judge Russell, as you said, for Republicans who
14 are removed to continue associating with Republicans who
15 remain, carves those individuals' voices effectively into
16 irrelevance.

17 This is supported by Justice Kagan's opinion in *Gill*
18 *against Whitford*, which we think is consistent with and very
19 well supported by the Supreme Court's earlier decision in
20 *Anderson against Celebrezze*. The idea behind this notion of
21 burden is that partisan gerrymanders, and I'm quoting now, may
22 infringe First Amendment rights held by parties, political
23 organizations and their members, by making it more difficult
24 for them to fund raise, to register voters, to attract
25 volunteers, to generate support from independents, and to

1 recruit candidates, good quality candidates to run for office.

2 That is reflective of what the Supreme Court said in
3 *Anderson against Celebrezze*, which was a ballot access case,
4 in which the Court explained, in effect, that what mattered
5 was not necessarily whether the burden -- and the burden in
6 that case was different filing deadlines for independents
7 versus members of the major political parties. And the Court
8 did not focus there on whether that burden -- what it
9 recognized was a burden on a political opportunity had
10 actually change an electoral outcome. What it focused on was
11 the way it diminished political opportunity by disrupting this
12 sort of association.

13 JUDGE BREDAR: And as a consequence, some of the
14 justiciability issues that arise on the other prong are
15 voided; right?

16 MR. KIMBERLY: Certainly so, Your Honor. Yes. And
17 I'll come back to that in a little bit as well.

18 MR. KIMBERLY: Now the last time that we were here
19 on the motion for the preliminary injunction, we had cited to
20 testimony of our plaintiffs, who had testified that in their
21 efforts to campaign in the 6th District they had run into
22 exactly these sorts of effects.

23 Beyond that, we have actual voter turnout data. Now
24 we have focused here on Republican primary turn out,
25 because -- for two reasons -- in, I should say, midterm years,

1 for two reasons. One, it is in the midterm years that the
2 congressional candidate is at the top of the ticket and most
3 likely to drive voters to the ballot box. And Republican
4 primary elections are where Republicans, because Maryland has
5 a closed primary system, only Republicans can participate,
6 registered Republicans can participate in the election.

7 And what we see is in Allegheny, Carroll, Frederick,
8 Garrett and Washington Counties, all of which span the 6th
9 District, turnout fell, for instance, in Allegheny from 42.77
10 percent, which I can say nationwide is an astronomical turnout
11 for a midterm primary election, dropped by 15 points to 26.65.
12 Every other county here dropped commensurately as well. The
13 smallest drop was roughly a two percent drop, a six percent
14 drop, but elsewhere other 15 percent drops, which you know
15 when you think about a 15 percent drop as compared to 42
16 percent, that's like one third of the voters who previously
17 had shown up not showing up and staying home.

18 And the reason is exactly what Governor O'Malley had
19 said in that speech, because what's the point of selecting --
20 showing up to the ballot box, engaging in the political
21 process to select a candidate who's almost certain to fail.

22 JUDGE BREDAR: But did Republican registration go up
23 during the same period? And if so, what do we make of that?

24 MR. KIMBERLY: There is a suggestion that Republican
25 registration had gone up. I don't -- truthfully, I don't know

1 what to make of that, except to say that so far as
2 participation in the political process is concerned,
3 registering people doesn't matter much if they don't show up
4 to the ballot box. And I think, ultimately, it's got to be
5 participation in the election itself that is the measure of
6 the engagement of the electorate. But -- and here,
7 incidentally, is a line graph demonstration of the drop off in
8 actual voter turnout rather than percentages as actual
9 numbers. You can see after 2010 there was a precipitous drop
10 off.

11 But I'll say we don't just have the reduction in
12 voter turnout at Republican primaries, we also have drop offs
13 in fundraising by the Republican central committees in
14 Allegheny, Garrett and Washington Counties, we have focused on
15 Allegheny, Garrett, and Washington, because those were the
16 counties that were in the district before the gerrymander and
17 remained entirely in the district after the gerrymander. And
18 what it shows is that during both midterm years and
19 presidential years, fundraising has dropped off by six to 12
20 percent.

21 And that also is unsurprising, because when the
22 Republican party, essentially, as Governor O'Malley put it,
23 gets carved into irrelevance by a gerrymander you would expect
24 to see lower financial support for that party.

25 And of course, beyond that, Judge Russell, as you

1 noted, it's simply the disruption of association that follows
2 from sorting people on the basis of their past -- excuse me,
3 past electoral behavior, making it more difficult for
4 historical Republican supporters to associate with fellow
5 historical Republican voters by cracking them into surrounding
6 districts where their voices are effectively drowned out by
7 Democratic majorities, that is what gerrymandering is all
8 about. And we think the evidence here very clearly and
9 strongly supports that conclusion.

10 JUDGE RUSSELL: But you want that as a matter of
11 law. In other words, there's no evidence in the record
12 demonstrating, for example, that the low turnout was weather
13 related or is there a contrasting turnout by the Democratic
14 party?

15 MR. KIMBERLY: And, Your Honor, the simple question
16 to that is yes, there is no genuine dispute in the record on
17 those questions. The State has not put those issues into
18 dispute. The record is as it is before this Court. And I
19 think you can conclude as a matter of law that these
20 disruptions to the associational activities of Republicans in
21 the area have indeed been disrupted. There's nothing to
22 suggest otherwise. And so we submit that we're entitled to
23 summary judgment on that question. Certainly, at the very
24 least, we'd be entitled to a trial. There's absolutely no
25 basis to suggest that the State would be entitled to summary

1 judgment on its cross motion.

2 Now, if I could, I'd like also to return to the
3 question of vote dilution which I think is relevant.

4 JUDGE NIEMEYER: Let me just ask on that last point,
5 which was said sort of casually. If you failed to make your
6 case factually, and we conclude it didn't establish the
7 requirement, that ends it. You don't get a trial on that.
8 You get a trial on a dispute that's been raised. And so this
9 is a motion, basically, you're asserting based on affidavits,
10 and your argument based on undisputed evidence, that there
11 were these effects. And in order to create a dispute, the
12 State would have to come forward with other possibilities and
13 we'd have to resolve that dispute. But if it turns out that
14 it's just inadequate as a factual matter, that ends the case.
15 You don't get a trial on that; right?

16 MR. KIMBERLY: That's right, Your Honor, if the
17 Court found that no rational fact finder could -- and that's
18 this Court in this case -- could find in our favor on the
19 basis of the evidence before it, then it would be a basis --

20 JUDGE NIEMEYER: I just wanted to keep the standard
21 clear on this.

22 MR. KIMBERLY: Certainly. And I apologize if I
23 misrepresented that standard.

24 Now, if I could, I'd like to come back to the
25 question briefly of vote dilution. Recognizing again that

1 this is a entirely independent line of proven burden, and that
2 if you're with us on this question of associational disruption
3 you needn't reach this particular issue. Before I get to that
4 let me just explain, vote dilution is proved with evidence of
5 block voting and political cohesion. Those are concepts that
6 are taken from the Section 2 civil rights litigation context
7 where the question is whether minority performing districts
8 have been gerrymandered and diluted impermissibly in violation
9 of Section 2 of the Voting Rights Act, those are quote,
10 unquote, vote dilution claims. And I'll get in just a bit
11 into the details of that framework.

12 And our position is that they have to -- vote
13 dilution so proved would have to make a practical difference.
14 We get that from this Court's opinion on the motion to
15 dismiss. And we think there are two ways of showing a
16 practical difference; that's a chilling of political
17 participation, which is related to what we were just talking
18 about, and that it has demonstrably diminished political
19 opportunity and influenced electoral outcomes. And I should
20 say in saying that we don't need to prove that every electoral
21 outcome has changed as a result of the gerrymander, I want to
22 make sure we avoid that misconception.

23 And here's how the Court put it on the motion to
24 dismiss, the injury is vote dilution. And to establish this
25 element, the plaintiff must show that the challenged map

1 diluted the votes of the targeted citizens to such a degree
2 that it resulted in a tangible and concrete adverse effect.
3 It has to have made a practical difference. And so that's
4 what I'm going to focus on here.

5 I should say this framework, I think, finds support
6 in the majority opinion in *Gill against Whitford*. The
7 majority opinion there confirmed that the harm of vote
8 dilution arises from the political composition of a particular
9 district, when the lines are drawn in such a way that the
10 vote, quote, "carries less weight than it would carry in
11 another hypothetical district."

12 The majority in *Gill* describes this as a burden on
13 plaintiffs' votes that has to be evaluated district by
14 district. And, of course, we have a single district challenge
15 here. So our position is that what the Court said, the
16 majority in *Gill*, is entirely consistent with the approach
17 that we have taken in this case to date.

18 So to show vote dilution there are typically three
19 showings these are called the *Gingles* preconditions. And
20 proof of these three preconditions is necessary, and we submit
21 in this case, sufficient to show that the vote dilution has,
22 quote, in the language of *Gingles* "impeded the ability of the
23 targeted voters to elect representatives of their choice."

24 Now, I'll come back to that in a bit. The first
25 element is that the minority group must be sufficiently large

1 and geographically compact to form the majority of a
2 reasonably drawn district in the area. We know that element
3 is satisfied, because between 1991 and 2011 historical
4 Republican voters did form the majority of the district and
5 had succeeded in electing their candidates of choice.

6 So my focus here is going to be on the second and
7 third elements, what I mentioned before, the idea that the
8 targeted minority's politically cohesive, and the majority
9 into which and among whom they are dispersed, vote as a block,
10 so that the dispersal of the targeted minority among the
11 surrounding majority will generally defeat the political will
12 of the minority.

13 And this is, in fact, the approach that our expert
14 Dr. McDonald took to the question of vote dilution. He said
15 he approached the question of vote dilution -- this is on page
16 3 of his report -- in a manner similar to that used in voter
17 rights litigation. He evaluated the way that registered
18 Republicans and registered Democrats behaved in elections and,
19 unsurprisingly, came to the conclusion that most Democrats
20 prefer Democratic candidates, most registered Republicans
21 prefer Republican candidates.

22 This is evidence that Democrats vote as a block. If
23 you are a historical Democratic voter you will generally vote
24 as a block with other historical Democratic voters in your
25 area. And if you are a registered Republican, you are

1 politically cohesive, you will generally vote together with
2 other registered Republicans. And it is on this basis that
3 Dr. McDonald found that the current 6th Congressional District
4 has the effect of diluting the votes of Republicans.

5 This chart was a subject of our preliminary
6 injunction hearing at some length. I'm presenting it here for
7 a much more modest proposition than we discussed last time.
8 It's just to say that when a district comprises a majority of
9 Democratic voters, it's very likely to elect the Democratic
10 candidate for office. This supports the inference that
11 Democrats generally vote together as a block. The more
12 Democrats you get in the district, the more likely it is that
13 the Democratic gets elected. The more Republicans you have in
14 the district, the more likely it is that the Republican gets
15 elected.

16 And we have evidence of election day voting from
17 members of the 6th District who were -- who stayed in the
18 district, who were taken out of the district, and who were
19 added to the district. What this shows is that voters are not
20 automatons, we're not suggesting they are. Voters exercise
21 choice in every election. What this does suggest, though, is
22 those areas that were removed had previously voted
23 overwhelmingly, over 60 percent of the time -- excuse me, over
24 60 percent of the electorate in favor of Republican
25 candidates. And after they were removed in the district they

1 continued to do so. Likewise, those areas who were added
2 voted overwhelmingly for Democrats, when they were added to
3 the District they continued to do so.

4 JUDGE BREDAR: Don't we just have the same problem
5 that we've had every time you and I have discussed this, which
6 is the difference between what happened in 2012, and what
7 happened in 2014, in the 6th. And, you know, your data, your
8 line drawing in this context shows a nice cluster in terms of
9 results and predictability and so forth, and how then do --
10 what would statisticians say about a nearly 20 percent swing
11 in terms of what happened in that district between those two
12 elections?

13 MR. KIMBERLY: Well, I guess what I would say is
14 that at this point --

15 JUDGE BREDAR: The Democrat won both times. One
16 time by 21.5 percent and one time by 1.5 percent. Is that
17 roughly correct?

18 MR. KIMBERLY: That sounds -- yes, here's the graph,
19 so it looks like a 18.5 percent swing.

20 JUDGE BREDAR: That's a pretty big swing in the
21 context of what we're talking about here where it's all
22 supposed to be so predictable based on how people align
23 themselves.

24 MR. KIMBERLY: Now, I want to be very clear that at
25 this point I'm not talking about predictability. I'm talking

1 about only the accepted legal concepts of block voting and
2 political cohesion.

3 JUDGE BREDAR: Should we accept them in the face of
4 data in our own case that show this kind of a swing?

5 MR. KIMBERLY: Well, I -- simply put, I think the
6 answer is yes. And it's because everything else indicates
7 that voters who associate with the Democratic party typically
8 vote as a block. And those who associate with a Republican
9 party are politically cohesive, which is to say --

10 JUDGE NIEMEYER: I thought that's what Justice Kagan
11 set out in her examples in *Gill*. She and Chief Justice
12 Roberts suggested that the injury is not a change in the
13 result, the injury is the disadvantage to the individual voter
14 by diluting his vote. And the hypothetical that she used, I
15 think, if I understood it, you don't even have to win to prove
16 dilution. In other words, the Democrats would not even have
17 to have won those elections if it were shown that the
18 Republicans were targeted and their votes were diluted --

19 MR. KIMBERLY: Right.

20 JUDGE NIEMEYER: -- disadvantaged in the process.
21 In other words, they focused, they say it several times, they
22 called it diminishment or disadvantaged to the voter in the
23 voting opportunity. So I -- I'm wondering whether it's
24 productive to get too much into the predictability of results.
25 You would expect a swing in the district, that's what the

1 Governor had said he wanted. And it, in fact, did happen.
2 But the fact that we have one year where the margin was minor
3 and two years where the margin was pretty comfortable --

4 MR. KIMBERLY: Right.

5 JUDGE NIEMEYER: -- I'm not sure detracts from the
6 theory that vote dilution is based on the disadvantage to the
7 voter and has less of an opportunity.

8 MR. KIMBERLY: Your Honor, that's exactly right.
9 And that's what I'm -- that's ultimately what I'm driving at.
10 I think Justice Kagan made another observation in her opinion
11 that was helpful. She said only a perfect gerrymander would
12 ensure beyond doubt that every electoral outcome has been
13 changed. But the standard under the law is not perfection.
14 It can't be that these sorts of targeting of individuals on
15 the basis of the way that they have expressed themselves at
16 the ballot box in prior elections. And in turn the clear
17 diminishment of their political opportunity as a result is
18 actionable only in the face of flawless perfection in
19 execution.

20 JUDGE BREDAR: So you would have claims here that
21 would succeed even if Roscoe Bartlett had won the 2012
22 election, despite the best efforts of the state authorities to
23 try to redistrict him out of office. And if he had continued
24 to win, through this decade, there's no requirement that it
25 actually have the concrete result of flipping the district.

1 MR. KIMBERLY: Well, I guess I would say that I
2 think that's a more difficult question. I think you would be
3 a lot less likely to see a lawsuit in that circumstance in any
4 event. What I would tell you, for certain, our position is
5 that if in 2014 a Republican had won, we'd still have a claim.
6 You know, it's no answer to say, well, we were trying to rig
7 all five elections, but we rigged only three.

8 Rigging an election by manipulating electoral --
9 excuse me, districting lines is a clear -- certainly a clear
10 burden on the voting rights of the Republicans who are
11 targeted. Their will is being thwarted by game playing with
12 line drawing. And the standard cannot be that we have to show
13 to a certainty that every electoral outcome has been changed
14 as a result. That's why I led off by explaining that our goal
15 here is to prove to you that there has been a practical
16 difference that manifests, as Judge Niemeyer was saying, as a
17 diminishment in the political opportunity of the Republicans
18 in the old 6th District.

19 JUDGE NIEMEYER: I hope it wasn't me. I'm actually
20 repeating the Supreme Court jurisprudence, which they
21 repeatedly stated based on past, they said it's the
22 diminishment of the votes so that the person, in fact, injured
23 in this instance has a vote of less worth.

24 MR. KIMBERLY: That's correct, Your Honor. And
25 that's why I started with *Gingles*, which is what lays out this

1 framework and makes it very clear that that's what the
2 standard is.

3 JUDGE NIEMEYER: Plaintiff has a right to an equally
4 weighted vote, that's the type -- that's what dilution is.

5 MR. KIMBERLY: Right. They're entitled not to be
6 treated differently and in course to have a less weighted,
7 less valuable vote, where the weight of that vote is
8 manipulated by line drawing, because the map drawers in
9 Annapolis disapprove of Republican voters electing Roscoe
10 Bartlett to office. That's exactly right. That is the crux
11 of vote dilution. And we submit to you in -- excuse me, in
12 Dr. McDonald's expert report, he undertook exactly this kind
13 of analysis and found there was exactly this kind of result.

14 And, indeed, you know, he was -- well, actually
15 could we go back to the bar graph?

16 Ultimately, what I would say about election results,
17 because I don't want to say that election results are
18 irrelevant. But I would point the Court to *Johnson versus De*
19 *Grandy*, a Supreme Court case from 1994, where the Court
20 emphasized that vote dilution and election results are not one
21 in the same, they are distinct, you can have one without the
22 other, and the other without the one. But lack of electoral
23 success is evidence of meaningful actionable vote dilution.
24 And lack of -- equal electoral opportunity, that's the
25 language that Judge Niemeyer was driving at.

1 And what we have here is evidence of lost elections.
2 So if you look at this graph that's up, you would have to
3 conclude, and there would have to be evidence to suggest that
4 this is really just a coincidence that has nothing to do with
5 the line drawing that took place, so that those red bars up to
6 28.2 percent in 2010, those red bars to the left of the dotted
7 line shifted to those blue bars to the right of the dotted
8 line in a manner that had nothing to do with the
9 redistricting.

10 We -- I suppose what I would say is it is not our
11 burden to show that each -- that the swing from 28.2 to 28.9
12 is 100 percent attributable to the way that the lines were
13 drawn. But this change in electoral outcomes is clear
14 evidence of meaningful vote dilution. You don't -- we have
15 searched, we did a search of academic literature in other
16 voting electoral outcomes, we couldn't find a single other
17 instance in history where a vote swing had changed -- this is
18 nearly 50 points from 28.2 plus for Republicans to 20.9 minus
19 for Republicans, nearly a 50-point swing that wasn't
20 associated with an intervening gerrymander. This sort of
21 thing just doesn't happen in the absence of this kind of
22 manipulation.

23 And so what we submit to you is these changes in
24 electoral outcomes are evidence of precisely the kind of vote
25 dilution that the Supreme Court has said represents a lack of

1 equal electoral opportunity that is an actionable burden
2 within the meaning of the Court's redistricting cases.

3 JUDGE BREDAR: But drawing a line so that there will
4 be some level of vote dilution is okay, because as Justice
5 Alito has told us, partisan gerrymandering has been part of
6 the process since the founding. So how do we know when
7 there's been too much?

8 MR. KIMBERLY: Well, I would point The Court, I
9 think in that regard, to the associational harms that we've
10 identified. Because the two go hand in hand. And I think
11 putting them together makes a rock solid case. We have clear
12 vote dilution here. It is coupled with not only changed
13 electoral outcomes, but as we explained the last time we were
14 here, according to *The Cook Political Report*, the largest
15 partisan swing anywhere in the country. And you couple that
16 with all of the ways it has disrupted Republican political
17 expression and participation and association in the area, and
18 I think you have a very clear recipe for a First Amendment
19 injury sufficient to warrant injunctive relief.

20 JUDGE BREDAR: But the Supreme Court has said
21 there's a flat ban on punishing people by virtue of their
22 political party membership. No lawful language like, well,
23 there can be some of this, just not too much, which they have,
24 you know, talked about in the context of voter dilution. I
25 mean they're different. It's a much crisper analysis, isn't

1 it, in the context of state action designed to interfere with
2 political association than is it with respect to state action
3 that's designed to draw the lines so that there's some
4 political consequence, some partisan consequence in the actual
5 votes that result, but not too much.

6 MR. KIMBERLY: Your Honor, I don't actually think
7 that distinction really holds up, because the cases that we
8 cited to this Court and to the Supreme Court in our merits
9 briefing, make clear that even in more traditional First
10 Amendment retaliation contexts like employment and handling of
11 prisoners, it isn't enough to show hurt feelings, insults are
12 not the stuff of a First Amendment retaliation claim. You
13 have to show that the action taken has actually imposed a
14 practical burden. That's where we got this standard. This is
15 why we presented it to the Court in this way on the motion to
16 dismiss.

17 And so, you know, for example, you could have
18 somebody who attempts to impose -- some superior in state
19 government attempt to impose a burden but it fails, or says
20 something that hurts the feelings of one of his employees
21 because of the way that employee had behaved at a public rally
22 supporting someone that that superior didn't also support.
23 That's not the stuff of a First Amendment retaliation claim.
24 So courts are constantly in the business of drawing the line
25 between abstract injuries and hurt feelings on the one hand,

1 and actions that actually make for a concrete burden to
2 support a First Amendment retaliation claim.

3 JUDGE BREDAR: But don't we know that some concrete
4 burden, some relatively minimal, but some concrete injury
5 sustained by voters is permittable -- is permissible in terms
6 of the consequences for an election? The line drawing to try
7 to nudge a district to be a little bit more Democratic is
8 okay, because it's been part of the -- it's root and branch of
9 a political process.

10 MR. KIMBERLY: Sure. And I guess my response to
11 that is our position has never been that you have to take all
12 consideration of political consequences redistricting out of
13 the mix. Our view is that there are a range of other sorts of
14 considerations that can go into the way that lines are drawn
15 that might nudge political outcomes one way or another, that
16 have nothing to do with a specific intent to burden voters
17 because the way they have voted in the past.

18 So to give one example, the evidence in this case is
19 that Congressman Ruppersberger wanted Fort Meade in his
20 district because at the time he was on the Intelligence
21 Committee, and he thought it would help him politically to
22 have Fort Meade in his district. That is a political
23 consideration designed to make it easier for him to succeed
24 politically. It is not the same -- and that --

25 JUDGE BREDAR: But not a partisan consideration.

1 MR. KIMBERLY: No it is a partisan consideration,
2 because to give it instead to the Republican candidate, the
3 1st District, which is probably what it would have gone to
4 based on where it is, would give the Republican an advantage
5 politically, or at least deny the Democrat an advantage
6 politically. So these are partisan considerations.

7 And Congressman Hoyer wanted College Park in his
8 district because he's an alumnus and can raise money more
9 easily from alumni of the University, if the University is in
10 his district. He can bring, I guess, federal benefits to the
11 University more easily if it's in his district. All with a
12 goal of making it easier for him to compete in the political
13 process. These are partisan considerations, designed to --
14 intended to use redistricting to influence politics. There's
15 nothing wrong with -- you know, you might have your own
16 judgments about whether or not that's tasteful or appropriate,
17 but under our First Amendment theory it's not unlawful.

18 And so my response to you, in that line of
19 questioning is that there is nothing inconsistent with what
20 you have observed in applying our theory. It just means that
21 the focus in the redistricting is on those other kinds of
22 political considerations. What's off the table is a specific
23 intent to single out people on the basis of the way they have
24 voted in the past, and attempt to prevent them from
25 participating meaningfully and on an equal playing field in

1 the political process as an expression effectively of
2 disapproval of that past political participation.

3 Okay. So that's -- and I'll be happy to come back
4 to the question of burden. That's what we have on burden.
5 I'd like to talk now a little bit about our third and final
6 element. And this, I think, is where last time we got -- and
7 I'll accept my own fault for this confusion -- where we
8 started talking about *Mt. Healthy* and whether *Mt. Healthy*
9 burden shifting applied in this context. And I think there
10 was a misunderstanding about whether it applied to
11 demonstrating electoral outcomes were attributable to the
12 gerrymander.

13 That is not what this element of the claim is about.
14 This element of the claim is the question whether there are
15 alternative explanations for the way that the lines were
16 drawn, that suggest that even if the map drawers had not
17 considered past partisan voting patterns and party
18 affiliation, they would have drawn the district in such a way
19 that the same results would obtain. Roughly the same lines,
20 same sort of vote dilution, same sort of disruption of
21 association.

22 And so *Hartman against Moore* puts it this way: Upon
23 a prima facie showing of retaliatory harm, the burden shifts
24 to the defendant to demonstrate that even without the impetus
25 to retaliate he would have taken the action complained of.

1 The idea is would the line -- would the 6th District have been
2 drawn --

3 JUDGE NIEMEYER: Is this question informed by the
4 nature of the evidence supporting intent? In other words, if
5 the intent is explicit, the intent here is not implied, the
6 intent here is we want to switch the 6th District from
7 Republican to Democrat. And to do so we're going to take out
8 a bunch of Republicans and put in a bunch of be Democrats. It
9 seems to me if that's the intent to do that, then it's not a
10 big step to go to the result, because that's exactly what they
11 did. Whereas, if there were other reasons for that, then --
12 and the intent was not explicit, then you get a much stronger
13 case. But here the explicit intent was to do exactly what
14 they accomplished.

15 And it seems to me that the first element feeds on
16 to the last element and helps support the last element.
17 Whereas, the first element they said, well, we just did it for
18 political reasons or we wanted to redo the districts to
19 improve the interests of the people and nothing else was said,
20 then you'd have to go to the last element to see if there's
21 any explanation other than First Amendment violations.

22 MR. KIMBERLY: I think that's --

23 JUDGE BREDAR: It's not my issue, but I've never
24 understood why you need *Mt. Healthy*. It's not where I'm
25 going, it's not something -- I don't have a dog in the fight

1 because you know where I am on the broader issue.

2 MR. KIMBERLY: Sure.

3 JUDGE BREDAR: But as an abstract matter I've never
4 understood why you need it on this proof.

5 MR. KIMBERLY: Oh, and I agree, Your Honor, I think
6 it's the right way to think about the law. I don't think we
7 need it. I think here the evidence is quite clear that the
8 only reason they drew the map the way that they did is because
9 they wanted to flip the 6th District.

10 JUDGE NIEMEYER: Because they said so.

11 MR. KIMBERLY: Because they said so.

12 JUDGE BREDAR: On TV, in this courtroom they said
13 so.

14 MR. KIMBERLY: And because every other -- and
15 because every other explanation they gave is just flatly
16 disproved in the evidence. The only one that was really
17 pressed in the evidence is the I-270 corridor explanation.
18 But, in fact, what the evidence shows is that no one
19 actually -- no one who was actually involved in the
20 redistricting thought one second about the I-270 corridor.

21 Martin O'Malley was very clear that what they were
22 considering in engaging in the redistricting was they wanted
23 to do it in a timely way that was consistent with what the
24 census results were. That makes sense. They wanted to comply
25 with the case law concerning one person, one vote, and Section

1 2 of the Voting Rights Act. That also makes sense. And then
2 besides those two things, the only thing they cared about was
3 flipping the 6th District.

4 I'm going to skip this. And, you know, here for
5 instance, is Speaker of the House Busch confirming he didn't
6 think --

7 (Video played.)

8 MR. KIMBERLY: Nobody was thinking about the I-270
9 corridor. I'm not going to guild the lily here. I think the
10 point is pretty clear. Every witness asked about the I-270
11 corridor, who was involved in the redistricting said, no, I
12 didn't think about that. Including Eric Hawkins who explained
13 he doesn't -- not only didn't he do it, he didn't recall
14 anybody else thinking about the I-270 corridor.

15 So the only context in which the I-270 corridor
16 comes up are these GRAC public hearings, which the evidence
17 shows, as we explained in our briefing, was really window
18 dressing for the behind the scenes process. And the only
19 people who raised the I-270 corridor explanation were all
20 Democratic party insiders, who are saying roughly consistent
21 things about a supposed community of interest and linking
22 Frederick and Montgomery Counties. But when asked whether
23 comments taken at the public hearings influenced the way the
24 map was drawn, a GRAC chair Jeanne Hitchcock said, no, they
25 didn't.

1 And so that leaves, I think, the rest of the
2 permanent injunction framework recognizing that that's at
3 least what we're asking for from the Court at this point. I
4 think the question of irreparable harm is straight forward.
5 The case law that we cited to this court is straight forward.
6 That elections held under unconstitutional maps --

7 JUDGE NIEMEYER: What's the remedy you're asking
8 for?

9 MR. KIMBERLY: The remedy that we're asking for is
10 an order enjoining the defendants from enforcing the map as
11 drawn. What I would suggest --

12 JUDGE NIEMEYER: That doesn't go far enough, does
13 it?

14 MR. KIMBERLY: Well, it would require in turn for
15 the legislature to enact a new map consistent with the legal
16 principles that the Court lays down, if it were to enter an
17 injunction of the kind that we're asking for.

18 Now, if it turns out that the legislature is unable
19 or unwilling to do so, either because there's not enough time
20 or because Democrats and the legislature and Governor Hogan in
21 the Governor's mansion can't agree on a map, I think then it
22 would fall to this Court, as is typical in these kinds of
23 redistricting cases, to adopt a map of its own. But we would
24 suggest it's appropriate at least as an initial matter to give
25 the legislature and opportunity to --

1 JUDGE NIEMEYER: The legislature and the Governor
2 could not even agree on giving it to a commission, could they?

3 MR. KIMBERLY: They couldn't. And, Your Honor, if
4 this Court concluded that would be a waste of everyone's time,
5 we would certainly be happy --

6 JUDGE NIEMEYER: I don't know if we can conclude
7 that. But just as a practical matter, thinking out loud,
8 it's -- if you're thinking about a remedy and if you were to
9 follow through on your particular claims, timing gets to be an
10 issue.

11 MR. KIMBERLY: It does.

12 JUDGE BREDAR: But before the Court jumps into it
13 and starts to draw lines or appoint its own expert or appoint
14 its own commission to do that, it seems that it would only be
15 fair and respectful, as much as we can be, of the role of the
16 other branches, to allow them an opportunity to come into
17 compliance on their own through their own means and methods.

18 MR. KIMBERLY: And so one alternative -- I might
19 suggest, the approach taken in Wisconsin was an injunction was
20 entered against enforcement of the map. And then the question
21 of remedy was briefed separately. I think that would be an
22 appropriate course here, because remedy is not something we've
23 briefed at length.

24 I would point the Court also to North Carolina, my
25 recollection is that before the Supreme Court proceedings in

1 that case there was leeway to the legislature to attempt to
2 draw a fair map, while in parallel the parties and court
3 worked on their own map. And setting a deadline for what the
4 legislature could accomplish, the Court was -- would then in
5 theory, if it hadn't been stayed, would then in theory have
6 been at the ready with a neutrally drawn map of its own if
7 that deadline passed without any objection by the legislature
8 and Governor's office.

9 But these are all issues that we haven't yet
10 briefed. And it might be that the appropriate course, if the
11 Court were inclined to enter an injunction, would be to order
12 expeditious briefing on that question after entering an
13 injunction.

14 JUDGE NIEMEYER: All right. Why don't we give the
15 State a little bit of a chance unless you have some --

16 JUDGE BREDAR: I have one more question for Mr.
17 Kimberly, if I might, Judge Niemeyer. And that is tell me
18 about where in this record do we find evidence of
19 associational injuries and harms, and what are they
20 specifically in your view? We've had some theoretical
21 discussions about what they could be, what they have been
22 found to be in other cases, but in the record of this case,
23 assembled by you and your opponents in the discovery phase,
24 what are we left with as proof of actual injuries in the
25 context of First Amendment retaliation and in relation to

1 associational rights?

2 MR. KIMBERLY: So I would say it was what we had
3 discussed earlier. It's the actual election returns, which
4 were disclosed to us in discovery in part of the record.
5 Those election returns show -- or I should say -- yeah, it's I
6 guess it's properly described as election returns -- show
7 decreased voter turnout in Republican primaries. That --

8 JUDGE NIEMEYER: That's what Justice Kagan focused
9 on, the effect on the party.

10 MR. KIMBERLY: Right.

11 JUDGE NIEMEYER: She talked about ravaging -- that
12 the injuries are ravaging the party he worked to support. In
13 other words, people lost -- didn't support it as much and they
14 didn't show up in elections as much. That would be the best
15 evidence you have; isn't it?

16 MR. KIMBERLY: That I think also with the campaign
17 finance disclosure reports, which show --

18 JUDGE NIEMEYER: Well, that's the support.

19 MR. KIMBERLY: Yes, the decreased financial support.
20 Exactly. Yes. And I think also, as Judge Russell noted, you
21 can also just look at the way that voters here were sorted.
22 The fact of the matter is 60-some-odd thousand historical
23 Republican voters were removed from the district and are now
24 thwarted in their ability to associate with like-minded
25 Republican supporters who were left in the district. I think

1 that too is just a very straight -- I mean, you can't deny the
2 disruption of association that's associated with that
3 observation. Whereas, before they could get together and work
4 to select a candidate that they wanted to send to Congress,
5 they can no longer.

6 JUDGE BREDAR: Can we just take notice of that or do
7 we need affidavits from individual Republicans who formerly
8 were in the 6th, now they're in the 8th or the 3rd, who say I
9 can't do this anymore, here's what I lost. I used to belong
10 to a Republican club and the line split us right down the
11 middle. Now I'm not in the same Republican club anymore. Now
12 I'm over in the 8th.

13 MR. KIMBERLY: I think the more straight forward
14 observation is simply that those who were moved from the 6th
15 can't vote in the 6th District anymore. So they cannot, I
16 suppose in sort of a, you know, if someone were inclined to
17 campaign for candidates in districts where they didn't reside
18 maybe it -- I mean, I think it's commonsensical to think that
19 Republicans in the 8th District would work to support the 8th
20 District candidate, but to no avail because they've been
21 drowned out and diluted by Democrats in the area. And
22 Republicans in the 6th District will work to support members,
23 candidates for congressional office in the 6th District, but
24 again to no avail, because they've been drowned out by
25 redistricting. Whereas, before the gerrymander those two

1 groups could have worked together to -- with greater electoral
2 success. And the reason they cannot now is because they've
3 been singled out for disfavored treatment, they've been placed
4 on an unequal playing field, and as a consequence have not
5 enjoyed the same political opportunity that they had before.

6 JUDGE BREDAR: Are there some associational impacts
7 that do not translate directly to voting. Suppose that one
8 was persuaded that there was something very much awry here,
9 but felt that proving it through actual election returns and
10 voting patterns is problematic because of a history that has
11 been set for us by the United States Supreme Court in the
12 context of voting in particular. Aren't there other First
13 Amendment rights and interests of an associational character
14 that don't tie so directly to voting?

15 MR. KIMBERLY: Yes and --

16 JUDGE BREDAR: Advocacy.

17 MR. KIMBERLY: Sure. Financial support is one
18 example. Which is something that we have. And, of course, we
19 also have the deposition testimony of our plaintiffs
20 explaining exactly this kind of disruption and confusion more
21 broadly than just showing up to the ballot box. But I think,
22 of course, showing up to the ballot box is highly relevant,
23 certainly it's an exercise of First Amendment rights. And the
24 ability of Republicans to associate in the area now has been
25 disrupted. Thank you all.

1 JUDGE NIEMEYER: All right. Who are we going to
2 hear from, from the State, Ms. Rice?

3 MS. RICE: Yes, Your Honor.

4 JUDGE NIEMEYER: I'll tell you what, why don't we
5 take a short recess. And you can gather all your thoughts, as
6 have you have already been doing, right after the break.
7 We'll take a short recess.

8 (A recess was taken.)

9 JUDGE NIEMEYER: All right. Be seated, please.
10 Ms. Rice, you haven't been standing there the whole time, have
11 you?

12 MS. RICE: I have not.

13 JUDGE NIEMEYER: All right. We'll hear from you.

14 MS. RICE: Good morning and thank you. The
15 plaintiffs are seeking an injunction applicable only to
16 the --

17 JUDGE BREDAR: Let's talk about settlement first.

18 MS. RICE: Yes.

19 JUDGE BREDAR: Where does the State stand with
20 respect to the viability of a settlement negotiation?

21 MS. RICE: Your Honor, as an Assistant Attorney
22 General, I don't know that I can currently make any
23 representations about the viability of a settlement
24 negotiation more to say that the State is always willing to
25 dialogue with any party seeking to settle a case. We have not

1 yet been approached in this matter. The client, State Board
2 of Elections is not independently empowered to draw
3 congressional district lines. The reason they're the
4 defendant in this case is because they're charged with
5 implementing that electoral map and that would be the proper
6 subject of the injunction, but there are clearly other --

7 JUDGE NIEMEYER: Let me suggest something, because
8 I'm fully sensitive to your role and its -- I mean, you're a
9 spokesperson for a very complex process and agencies and so
10 forth, is there any room in your role to have the
11 administration -- and actually it would have to be, I suppose,
12 the Attorney General and the Governor -- but approve some
13 notion where you could yield to a court jurisdiction over this
14 issue, and agree to some kind of commission, say, headed up by
15 a magistrate judge. And then having a designee of you and a
16 designee of the plaintiffs on there and see if they can't work
17 something out --

18 MS. RICE: Just to be clear --

19 JUDGE NIEMEYER: -- to try to obviate the problems
20 you were talking about, which are real, there's no doubt about
21 it.

22 MS. RICE: Sure. Just to be clear, the Attorney
23 General's role here is just to defend the constitutionality of
24 the law, he does not take any position in this matter or would
25 likely not be involved in any resolution of the matter. But

1 in terms of are there options, could we think creatively about
2 a way forward if there was interest on both sides to create a
3 dialogue, I'm sure --

4 JUDGE BREDAR: I don't hear any state officials
5 within your specific client, or more broadly among the State
6 in general, which the Attorney General represents, overtly
7 defending and advocating for the appropriateness of extreme
8 partisan political gerrymanders. I don't see that in this
9 record, certainly, and I don't see it more broadly out there
10 in the wider world.

11 If anything, the conventional wisdom seems to be
12 that it's a bad thing, that there's much agreement with what
13 the Supreme Court has said in other cases, that it's
14 repugnant, that it's in conflict with basic principles about
15 how Democratic government ought to operate and ought to work.
16 Even forces in the state of Maryland have gotten behind
17 legislation saying essentially, Maryland would go along with
18 some kind of a more neutral approach, if other states would as
19 well. That's certainly something that we're all aware of.

20 So, accordingly, is there an opportunity here, a
21 moment when it's appropriate for litigants in the Maryland
22 case to reach out to litigants in another case, say Wisconsin
23 or North Carolina, where the political equities are exactly
24 opposite of what they are in Maryland, and settle two cases
25 simultaneously with a net effect that no one gains political

1 advantage, which seems to be what's ultimately driving all
2 this.

3 Everyone condemns it. Everyone says it's terrible,
4 but nobody will fix it, because nobody's prepared to
5 unilaterally disarm. Well, then find others who you can get
6 in partnership with and settle the Maryland and Wisconsin
7 cases simultaneously, with no net effect in terms of the
8 politics, other than the people have a more pure Democratic
9 process. Is anyone thinking along those lines?

10 MS. RICE: Your Honor, I will certainly bring back
11 the thoughts from this morning's hearings to my clients. I
12 have not, before this hearing, had the opportunity to discuss
13 settlement with them. We have not been approached by the
14 plaintiffs in the past about any willingness to settle. So I
15 just don't have the information --

16 JUDGE BREDAR: The state of Maryland settles
17 difficult cases in this court every year and perhaps every
18 month. And some of them require all kinds of steps that have
19 to be taken back with the Board of Public Works, even back to
20 the legislature. You know that from personal experience, that
21 our magistrate judges resolve those matters on a tentative
22 basis subject to appropriate legislation being adopted, or the
23 BPW ratifying. But there are ways by which your very complex
24 client can be brought to the settlement table successfully and
25 agreements can be reached that resolve hard thorny problems

1 like this, if there's a will.

2 MS. RICE: Your Honor, I do agree that there are
3 many different methods and that our office would always advise
4 our clients on the availability of different methods and work
5 creatively with the Court and the other parties to settle a
6 case. I just don't have any information about the willingness
7 to do so at this time. I would point out that Wisconsin is a
8 state legislative case and in North Carolina the gap is
9 something like it's -- the number of seats at issue is many
10 more than the one at issue in this case.

11 JUDGE BREDAR: You could sweep away all of these
12 problems by states such as Maryland and Wisconsin agreeing
13 that across the board, nonpartisan commissions would do the
14 districting at the state legislative level, at the level of
15 congressional districts, and clear away all of these issues in
16 both states with one sweeping initiative that is just adopted
17 on a mere basis in both places, to no net -- no significant
18 net political effect.

19 MS. RICE: Your Honor, we definitely appreciate
20 these comments and the creative direction that they're
21 heading.

22 JUDGE NIEMEYER: All right. You have a motion for
23 summary judgment against you, which you've answered, and then
24 you have filed a cross motion for summary judgment. So
25 however you wish to handle it, we'll hear from you on that.

1 MS. RICE: Thank you, Your Honor. I think that
2 we'll start with our cross motion for summary judgment. And I
3 think it is, again, appropriate to go back to what the
4 plaintiffs have asked for, the context in which they're asking
5 it. We -- the plaintiffs are looking to enjoin just the 2020
6 election. That's one -- the 5th and last election under the
7 2011 plan. The 2011 plan was arrived at only after public
8 comments, compromise between the Governor and the legislature,
9 of all of the incumbents, Republican and Democrat, and
10 approval by the voters of Maryland in referendum.

11 There have also been many changes of circumstance
12 since 2010. We're actually gearing up right now for the
13 conduct of the 2020 census. So there are many demographic
14 changes that have happened since 2010. There is a different
15 match up in the 6th Congressional District. Congressman
16 Delaney has announced his retirement. We have two new
17 candidates that are facing off in the 2018 election, and we
18 have no evidence of the plaintiff's preferences in that race.

19 All of this is happening after we have had a long
20 and whirry procedural history of this case in front of this
21 court the plaintiffs did not bring --

22 JUDGE NIEMEYER: Not many cases have a Supreme Court
23 chiming in twice.

24 MS. RICE: It's true. We're lucky --

25 JUDGE NIEMEYER: And still having to take it

1 again.

2 MS. RICE: We're lucky in that way to have had their
3 wisdom multiple times. And because of that we did not even
4 get this claim from these plaintiffs until March 2016, after
5 the 2016 primaries had already concluded. And the third
6 election cycle under the plan was well underway. So those
7 things have not changed since we were here on the preliminary
8 injunction motion.

9 Subsequently, the plaintiffs were afforded five
10 months of fact discovery, an additional month of expert
11 discovery, and this Court offered to entertain motions to
12 reopen discovery on remand. An offer which neither party has
13 taken them up on. So that is how we got here. And we are
14 here on motions for summary judgment. The plaintiffs have the
15 burden of persuasion in their claim. So under *Ricci* and
16 *Celotex* you can find in favor of the state in our cross motion
17 for summary judgment merely by finding that the plaintiffs
18 have not met the burden of production on one or more of the
19 elements of their claim.

20 And we agree with the plaintiffs that there are --
21 do not appear to be many disputes over the material facts as
22 to burden and causation. But what the plaintiffs have done is
23 asked you to make inferences with respect to causation that
24 are not supported by evidence. They can't now hope that
25 evidence will be developed at trial, they must make those

1 demonstrations on the record that are --

2 JUDGE NIEMEYER: I think I -- I think I gather you
3 agree with what I tried to clarify with Mr. Kimberly, which is
4 if they failed to advance facts sufficient to carry their
5 case, then they're not entitled to summary judgment. And the
6 only way to go to trial on that is if they have carried it and
7 then you've created a dispute about those facts. And that
8 needs to be resolved to resolve the case. And it looks to me
9 like both parties have spent a lot of time putting forward
10 almost every fact they have. And I can't foresee anymore
11 facts coming forward.

12 But you're not entitled to that under summary
13 judgment, you don't get a second crack. If you haven't put
14 your facts forward, sufficiently to carry the day, you lose.
15 And that -- I think that's standard Rule 56 jurisprudence;
16 isn't it?

17 MS. RICE: That's correct, Your Honor. And we also
18 need to bear in mind here that the plaintiffs are seeking a
19 permanent injunction. The four factors are the same, more or
20 less, than a preliminary. The only difference is that
21 plaintiffs actually must succeed on the merits of their claim,
22 not just show likelihood of success. This is a high bar, as
23 it should be. Even if success on the merits were certain,
24 it's not enough. They must still satisfy those equitable
25 factors. And there has been no change since the Supreme Court

1 held in Benisek, that the plaintiffs failed to do so. They've
2 put no further facts forward on their irreparable harm. In
3 fact they haven't updated the facts that they had about the
4 effects of future elections in their supplemental motions.

5 So I think --

6 JUDGE NIEMEYER: Well, I don't quite understand
7 irreparable harm. I understand some of the other equities
8 you've mentioned in your papers, but irreparable harm would be
9 if there has been dilution or injury to their associational
10 rights, those are things -- those are still in place, the
11 lines are still in place which have given rise to that. And
12 this is not a damage case in terms of dollars. This is to
13 rectify, according to them, a First Amendment violation. And
14 so on that issue, I have a very hard time conceptualizing what
15 you're saying, that equity would seem to be the only court
16 that could address the remedy. But your other points I
17 understand them from your papers.

18 MS. RICE: Sure. I think that maybe looking back at
19 this Court's legal finding three, and the memorandum on the
20 preliminary injunction would be helpful. There this Court
21 quoted *Bryant v. Cheney* for the proposition that standing for
22 irreparable injury is ongoing. And that when plaintiffs are
23 seeking prospective -- sorry, that's paraphrasing, are
24 asked -- the Court is asked to award prospective equitable
25 relief for a concrete past harm, and a plaintiff's past injury

1 does not confer standing upon him to enjoin the possibility of
2 future injuries.

3 And I think there we are again, thrown into this
4 complex world of voting causation and what the electoral
5 circumstances actually are on the ground in the 6th District
6 in 2018 and 2020. We just don't have anymore information. We
7 don't even have information from the plaintiffs about what
8 their electoral preferences are, whether it would be for David
9 Trone, Amie Hoeber, or some third candidate, or perhaps even
10 to write in Roscoe Bartlett again. The record's just devoid
11 of that information.

12 And we did, by contrast, have information that each
13 of the plaintiffs, like good voters do, examines each of the
14 candidates for all of their flaws and strengths, and makes a
15 decision based on the candidates. And each of their
16 depositions each plaintiff admitted at one time or another to
17 voting for a Democrat. Some of these were for not
18 congressperson, a more local matter, sometimes even a judge,
19 but each could recall a time that they had crossed party lines
20 and voted for the other party. Out of the plaintiffs that
21 lived in the 6th District and were eligible to vote at a
22 time -- at the time, all four of those plaintiffs Benisek,
23 Strine, Cueman, and Eyler, admitted to voting for a Democrat
24 for Congress, someone other than Roscoe Bartlett, going back
25 that far.

1 So here we have the plaintiffs, as most voters do,
2 making representations that they evaluate the races
3 individually. And we don't have any information from them
4 about how they would evaluate this match up. It might be a
5 reasonable inference to draw that they would still disfavor
6 John Delaney in subsequent elections, but now that he is not
7 seeking that seat, we simply must proceed without -- I think
8 it is helpful to look at *Gill's* pronouncements about standing.
9 *Gill* emphasized that standing was an individualized as opposed
10 to a party-wide injury.

11 And I think that that is very important here. The
12 majority did not embrace Justice Kagan's suggestion of
13 associational injury even to establish standing. Although, it
14 might be tempting to do so to sort of extend that rationale.
15 And --

16 JUDGE BREDAR: They didn't reject it either.

17 MS. RICE: They didn't object to it either. And an
18 interesting fact is that the Supreme Court remanded both *Gill*
19 and *Rucho* for further proceedings on standing, even though the
20 Courts in those matters had made specific findings about
21 district-wide electoral results. So I think we can take from
22 that that there's something more that needs to be done, that
23 something extra needs to be done to tie in individual -- the
24 burden on an individual vote, than merely repeating the
25 district wide --

1 JUDGE NIEMEYER: I thought the Court, if I
2 understood the Court's holding, it was pretty narrow, and the
3 holding basically was that the plaintiffs did not seek -- I'm
4 now quoting -- to show such requisite harm, since on the
5 record it appears that not a single plaintiff sought to prove
6 that he or she lives in a cracked or packed district. And --
7 end quote. And the Court pointed out that it's an individual
8 claim and that a person who seeks to assert a right for
9 dilution, or I suppose associational rights too, would have to
10 live in the district that was affected. And it seems just the
11 opposite of what you're saying, that if they do live in the
12 district they have standing.

13 MS. RICE: Sure. So we can look at the Supreme
14 Court, I think it's at page 1933 in the Supreme Court
15 Reporter, has a discussion of two of the plaintiffs in
16 *Whitford v. Gill*, and one is Whitford who admitted his vote
17 was neither cracked nor packed on the stand. And then there's
18 another plaintiff Donohue. And the Court says Donohue on the
19 other hand alleges that Act 43 burdened her individual vote.
20 And that was because she claimed residency in one of the
21 districts where Democrats like her have allegedly been
22 deliberately cracked.

23 But the Supreme Court didn't find that allegation
24 sufficient to find that Donohue had standing to proceed with
25 the claim. If it had, there wouldn't have been the standing

1 problem. So we're, again, looking at something more,
2 something that actually shows, like this voter had some impact
3 to their own vote. So I think --

4 JUDGE NIEMEYER: The Court didn't say that, the
5 Court says to the extent the plaintiffs allege harm is the
6 dilution of their votes, that injury is district specific.
7 This disadvantage to the voter as an individual, therefore,
8 results from the boundaries of the particular district in
9 which he resides. And the plaintiff's remedy must be limited
10 to the inadequacy of that produced his injury in fact, that is
11 the disadvantage. In this case the remedy that is proper and
12 sufficient lies in the revision of the boundaries of the
13 individual's own districts.

14 And then the Court went on to point out that in this
15 case they were challenging statewide injury and taking the
16 plaintiff as to where they were. The plaintiffs argue that
17 their claim of statewide injury is analogous to claims
18 presented in *Baker* and the Court then said that's not true.
19 And that's the only standing it addressed.

20 But it seemed to me, it's pretty clear, and you look
21 at Justice Kagan's opinion too, it's pretty clear that if you
22 live in the district which you are challenging, because it was
23 cracked or packed, you have standing to challenge that. Now,
24 whether you win or lose is another injury, but the standing is
25 created by the disadvantage of their vote in that district.

1 MS. RICE: Your Honor, I don't think we're
2 disagreeing --

3 JUDGE NIEMEYER: Okay. Fair enough.

4 MS. RICE: -- disadvantage that exists would be --

5 JUDGE NIEMEYER: I thought you were suggesting that
6 a couple of people in the *Gill* case actually had standing.

7 MS. RICE: No, I think what I'm saying is that
8 something more has to be demonstrated about what that cracking
9 or packing is --

10 JUDGE BREDAR: Well, so when the North Carolina case
11 was remanded, and the Court said very briefly what they said
12 vis-a-vis North Carolina, and that case went back, and the
13 panel reconsidered, and then issued their new opinion and
14 found that there was standing, what -- what more did they
15 actually really find on the road to concluding that there was
16 standing in compliance with what *Gill* said there had to be?
17 Not much.

18 MS. RICE: Well, actually quite a lot. And you
19 anticipated where I was going. And August 27th the *Rucho*
20 court came out with a new opinion. And there the standing
21 facts were well-developed. Each individual put on evidence
22 that their precinct would have been better off, in terms of
23 the way that their precinct voted, would be more like the
24 district total, under 2,000 different maps that were computer
25 generated. So in more than half of those computer generated

1 maps, they would have been better off. So they made actually
2 quite a strong showing that their individual right to vote had
3 been burdened. Because they showed that in the possibility of
4 alternative districts they had been put in one of the
5 districts that would have most burdened their votes.

6 So we don't have any of that evidence here. We
7 don't have any expert that's come before you to give you that
8 kind of evidence. We have a singular map that was -- could
9 not even be said to have been drawn without reference to
10 political data. And if you look at it -- let me put it up
11 here. Is that showing up for you? This is the single
12 alternative map.

13 And Dr. McDonald admitted that he himself did not
14 draw this map, he had his graduate student do it. When
15 questioned at deposition he could not guarantee that the
16 graduate student had not resorted to political data when
17 drawing that line. The graduate student had access to the
18 data and Dr. McDonald did not have a conversation with him
19 about whether or not he looked at political data.

20 You can see that the choice was made here to include
21 both Gaithersburg and Rockville in the alternative 8th
22 District that was proposed. And if you look at this is just
23 the next page in that report, the consequence of that choice
24 is that the 8th District becomes even more packed with
25 Democrats than it had been under the prior map.

1 So -- and Dr. McDonald himself admitted that this
2 alternative map -- again, this is to establish standing we're
3 not talking about remedy, we're talking about standing, that
4 this alternative map would also burden the votes of Democrats
5 in the 8th District. And the reason that's important here at
6 standing -- in standing is because that makes it not a neutral
7 comparator map. This map has serious political consequences.
8 It resulted in --

9 JUDGE NIEMEYER: Sounds to me you're arguing the
10 merits of the case. Standing just focuses on whether he can
11 be in court and make a claim. And in this case the plaintiffs
12 are in the very district and voted in the very district that
13 was affected, and they make a claim. Now, whether their claim
14 is good or not, we have to test that. But I think on the
15 threshold of standing, then no one would have standing in
16 these cases if it weren't the voters affected in that
17 district. At least they claim to be affected. They voted in
18 that district. And they voted in a district that was redrawn
19 to dilute their vote, allegedly.

20 But I don't know -- I don't quite understand why
21 this doesn't fit exactly with what Justice Roberts and Justice
22 Kagan were pointing out pretty straight forwardly.

23 MS. RICE: Well, Justice Kagan went on a little bit
24 more at length than Justice Roberts did in explaining how you
25 might demonstrate standing. One of the things she said, and

1 plaintiffs also pointed this out, you have to demonstrate by
2 way of a neutrally drawn map that such a citizen's vote would
3 carry less weight, have less consequence --

4 JUDGE NIEMEYER: That's to show dilution. And then
5 she went on to talk about associational. But that would -- to
6 have standing, to bring a partisan claim on vote dilution, the
7 plaintiff must prove the value of her own vote has been
8 contracted.

9 MS. RICE: Correct. So to show that your own vote
10 had been contracted you can't just refer to what actually
11 happened, because you don't -- you can't see -- and this is
12 part of what we talked about last time, also on the merits --
13 you can't see very well or understand statistically whether
14 that is an effect of the redistricting, it is an effect of
15 where you live and changing demographics. To demonstrate that
16 you need something more. And we're at summary judgment, we're
17 not at pleading stage, and evidence is necessary to
18 demonstrate injury at this stage.

19 So for the vote dilution injury and we can talk
20 about in a minute the associational harms and the evidence
21 there, but for the vote dilution injury, this map that does
22 not explain whether or how many voting tabulation districts or
23 census places are split in the line, that wasn't part of Dr.
24 McDonald's report, that has no explanation of the effects on
25 the neighboring districts, and in this case it's just the

1 8th --

2 JUDGE NIEMEYER: What about the evidence that's been
3 advanced that you only needed to remove 10,000 people from the
4 6th District to comply with the census. Instead, 66,000
5 Republicans were removed and 20-some thousand Democrats were
6 reintroduced into the district, with the results that the
7 Republicans still continued to vote and the Democrats still
8 continued to vote as they did in prior deals, but their vote
9 didn't have as much value. And that evidence is in the
10 record, whether it carries the day is something we have to
11 make a judgment on, but it seems to me, for standing purposes,
12 they have alleged that there -- the value of their vote has
13 been contracted.

14 MS. RICE: That evidence, I think we've discussed at
15 length in the past and the -- there's a fallacy in saying that
16 only 10,000 people needed to be removed. Because we're
17 talking about redistricting an entire state. We didn't --
18 Maryland didn't redistrict the 6th District in isolation.
19 There were severe population deficits in other parts of the
20 state that needed to be remedied somehow. And in doing that,
21 making those choices, some of which very clearly, including
22 taking the 4th district out of Montgomery County, had
23 absolutely nothing to do with big P partisan politics,
24 *Fletcher v. Lamone* talks about at length about the
25 legislature's intent and adopting the proposal of the Black

1 Legislative Caucus in that move that --

2 JUDGE NIEMEYER: I don't understand, I thought the
3 6th District only needed to be reduced in population by some
4 10,000 people. And those 10,000 people could either be moved
5 into the 3rd or the 8th Districts. And the question is why
6 such a big change when that's a very modest change. I'm sure
7 there are other districts that might be affected by the
8 census, but that -- you would expect that if they told the
9 mapmakers we want to get rid of a Republican candidate and
10 have a Democrat win there, that was the goal that the Governor
11 said he had and that's what the map drawer was told that, give
12 us a 7 to 1 map.

13 MS. RICE: If we're looking at what needed to be
14 done to accomplish the legislature's goals, there's no
15 indication that the legislature and the Governor would have
16 changed their mind about the Chesapeake Bay crossing if it had
17 not helped them --

18 JUDGE NIEMEYER: I was focusing on just the 10,000
19 which is a very modest --

20 MS. RICE: Sure. But I guess what I would counter
21 with is that you cannot focus just on the 10,000. To do so
22 would be to make very grave error about the way that these
23 things are done. The 1st, the 2nd and the 7th all had massive
24 population deficits that needed to be made up. They were
25 bordering the 6th at the time.

1 So when you look at the shed portions, and this is a
2 page from Dr. McDonald's expert report, he's the one that did
3 this analysis, you can see that the 7th District -- for
4 example, the 6th District gave 17,203 people to the 7th
5 District. That's because the 7th District had a massive
6 population deficit. And the 1st District over 100,000 voters
7 needed to be made up for when the Chesapeake Bay crossing was
8 eliminated.

9 The 6th District had, in the prior map, extended all
10 the way to the Susquehanna River. It went across the entire
11 northern border of the state to border the 1st District. So
12 the legislature, I think, pretty reasonably moved that border
13 westward, back towards the core historic shape of the 6th
14 District. So to say that these population moves were not
15 occasioned by other goals of the legislature is to --

16 JUDGE NIEMEYER: Let me ask you --

17 MS. RICE: -- reality.

18 JUDGE NIEMEYER: -- what evidence do we have that
19 they had other goals? In other words, we have the direct
20 evidence of the people who made the maps and directed the
21 making the maps. And what you're describing isn't what they
22 said.

23 MS. RICE: It was, Your Honor. So Governor O'Malley
24 talks about the respecting the natural boundaries of the
25 Chesapeake Bay in his deposition --

1 JUDGE NIEMEYER: Well, that was when he made the
2 decision to not go across the bay. He said he had to make a
3 choice in order to get a 7-1 state, he had to make a choice
4 either to focus on the Eastern Shore or to focus on western
5 Maryland. And he said the problem with folks on the Eastern
6 Shore were jumping across the Chesapeake Bay, but he didn't
7 back off from the notion that he wanted a 7-1 state and that's
8 what they directed the mapmaker to do.

9 MS. RICE: I think that if you read that colloquy in
10 context, what he says, that all other things being equal,
11 meaning all other goals of the legislature being met, which
12 include these goals about the 4th District, which was very
13 important to the legislature and proved to be a contentious
14 issue that was litigated before this Court before this case
15 was brought, that those were other goals.

16 And so the fact that that goal of moving eliminating
17 the Chesapeake Bay crossing, which is a very wide overwater
18 crossing, also allowed the Democrats to create a competitive
19 district where for the first time they would see a fighting
20 chance in that district to elect a candidate of their choice,
21 after they had heard extensive testimony at the GRAC that that
22 was a concern, including testimony from a former plaintiff in
23 this case, who said that it was eminently reasonable to return
24 the 6th District to its former shape, which would have
25 included the western third of Montgomery County. Again,

1 that's consistent with this I-270 corridor. That's about
2 where I-270 splits the county. That evidence was before the
3 GRAC, that evidence was on the mind of the mapmaker. We have
4 evidence affidavits from the --

5 JUDGE NIEMEYER: Were there GRAC hearings after the
6 map had been drawn?

7 MS. RICE: No, the GRAC hearings were before the map
8 had been drawn and the documentation --

9 JUDGE NIEMEYER: There was no map -- there was no
10 proposed map in consideration when they had those hearings?

11 MS. RICE: Correct. But the time line is that the
12 GRAC hearings were held. The map was drawn and completed at
13 the same time the Governor was gathering input from the
14 congressional delegation, including in-person meetings with
15 both Congressman Bartlett and Congressman Harris, to get their
16 input about what they would like to see from their districts.
17 And the GRAC map was proposed. That's where that slide show
18 comes in, that again mentions the I-270 corridor as a major
19 organizing point of the geography of the 6th District.

20 The map was then put up on the public website.
21 Additional public comments were held from e-mail comments.
22 And then the Governor, with minor changes that we've
23 stipulated do not bear on this cause of action, adopted his
24 recommended map, sent it to the legislature. Again, there
25 were a few changes, mostly metes and bounds descriptions type

1 changes. It was passed. Then the entire map was voted on by
2 the people of Maryland.

3 So there isn't evidence, unlike in North Carolina,
4 where the map had already been drafted and it was only after,
5 you know, there's some evidence that that time line was not
6 adhered to. Here there's no evidence of that. There's no
7 evidence that a map had been drafted before the GRAC
8 hearings.

9 JUDGE NIEMEYER: There is evidence, though, that the
10 GRAC hearings were superficial, just to accommodate the
11 public, and that the real map was going to be drawn by certain
12 legislatures with the map drawer and the governor, according
13 to the governor's wishes.

14 MS. RICE: So there's also really no evidence of
15 that. And the plaintiffs put before you testimony from Eric
16 Hawkins on intent. And this is kind of getting a little bit
17 far astray, but since we're talking about it. We introduced
18 affidavit testimony from Jake Weissmann, who was a staffer to
19 the GRAC, about just how seriously they took the congressional
20 map. Both Jake and also Governor O'Malley stated that they
21 had to scrap the congressional delegation's version of the
22 map.

23 And I'm going to put it here so you can kind of see
24 that this is the map that Mr. Weissmann testified was the
25 proposal from the congressional delegation. Although, as

1 governor O'Malley would be quick to point out, it was not a
2 unanimous proposal. So you can see how the 6th District
3 here --

4 JUDGE RUSSELL: Why don't you use a pen or something
5 and use the ELMO as a visual, if you could. Are you following
6 me?

7 MS. RICE: I am following you. Let's see if I can
8 do it.

9 JUDGE RUSSELL: Oh, no, just write on the ELMO.

10 MS. RICE: Oh, write on the ELMO.

11 JUDGE RUSSELL: Use your pen and point it out as
12 you're describing it.

13 MS. RICE: I got it. So you can see this is the 6th
14 District, the proposed 6th District, congressional delegation,
15 it's green. And this is the proposed 8th, the pink one. The
16 I-270 corridor is not intact.

17 JUDGE BREDAR: Laughable.

18 JUDGE NIEMEYER: That's a fairly complex map; isn't
19 it?

20 MS. RICE: It is. And as you can see it is not the
21 map that was adopted. And if we want to we can look --

22 JUDGE BREDAR: Highly reflective of what the
23 politicians intentions were.

24 MS. RICE: Yes.

25 JUDGE BREDAR: Absurd on its face.

1 MS. RICE: So here you can see that the map that was
2 ultimately adopted, actually hews to the I-270 corridor,
3 incorporating both Frederick and all of the Montgomery County
4 portions that would be on the Montgomery corridor down to
5 Rockville, which is too populous to include in a district with
6 Frederick. So that's pretty good evidence that the I-270
7 justification was important, it was something that actually
8 mattered to the mapmakers, because they altered that map that
9 Mr. Hawkins was testifying about so profoundly in terms of
10 what areas it picks up.

11 So I think that this just goes to demonstrate that
12 there is a causation element that is missing here. We do not
13 have specific testimony about specific borders about where the
14 plaintiffs live in relation to those borders, why those
15 borders were placed the way that they were. And what effect
16 that had on the plaintiffs in terms of whether or not they
17 would have been burdened under any alternative map or if it
18 was just this one that did it. And I think that's why this is
19 relevant in the standing context. Although, it of course also
20 goes to the burden on the merits.

21 I think it's worth too exploring a little bit about
22 whether they've met their showing for an associational harm on
23 even at a standing level. First, if we look at *Gill*, and I
24 think that Your Honors each pointed this out, that the
25 associational harm that Justice Kagan is talking about is

1 really one that would enure most to parties or political
2 organizations. There's not a lot of evidence here about the
3 effect on the Republican party.

4 We have kind of unsupported cherry picking from
5 campaign finance reports, that show at most a \$4,000 decline
6 in raising funds from one period to the next. But no
7 explanation if that's unusual. No comparison to the statewide
8 performance, none of the things that would allow this court to
9 make a causal inference that that kind of decline in
10 fundraising had anything to do with the redistricting or this
11 map.

12 JUDGE BREDAR: Well, are we talking standing or
13 merits right now?

14 MS. RICE: I think that these deficits are so
15 profound that they do go to standing. We also need to think
16 about the fact that standing is not dispensed in gross and
17 that this associational harm is fairly new to the case in the
18 way that the plaintiffs articulate it. They've talked about
19 chilling, certainly, as another way to demonstrate their
20 burden under the retaliation cause of action, but that's
21 different than an associational harm, which would be actual
22 damage to their associational rights.

23 So to the extent that the Court believes that
24 associational harm could yield standing, I think we can kind
25 of kill two birds with one stone there.

1 JUDGE BREDAR: Well, a lot of the answer is rooted
2 in the word "association," right? I mean, if you can't
3 associate, you have an associational harm. And if you're
4 divided from those with whom you previously meaningfully
5 associated, isn't that the end of it?

6 MS. RICE: I think there too we need to think about
7 what that means in terms of justiciability. If we look just
8 at this map versus the immediately prior map, there's a lot of
9 people in a lot of districts that are not going to be able to
10 associate with the same people that they associated with.

11 JUDGE BREDAR: Well, that's true, for certain, every
12 time there has been redistricting and there have been
13 population changes in the a state. Without a doubt there are
14 associational consequences from redistricting. But that's not
15 the point. The point is what was the motivation in dividing
16 these people from each other in this particular instance.

17 MS. RICE: But I think that's why --

18 JUDGE BREDAR: If the motivation was, look those
19 Republicans concentrated together like that as they are, are
20 able to fund raise and advocate together, strength in numbers
21 in terms of the broader political process, not even talking
22 yet about voting, we're going to break that up. We're going
23 to do this to them because of the -- their identifying as
24 Republicans.

25 MS. RICE: So I think that that's why it's important

1 to think about this in a standing context, that we have to
2 show that that injury is not a statewide injury or a injury
3 that enures generally to anybody because of redistricting.
4 *Gill* reiterated that much at least, that we have to show
5 something more. So when plaintiffs got up here and you asked
6 them what evidence is there of associational harm, one of the
7 things that they said was just the splitting of the districts.
8 That needs to be rejected as a matter of law, because the
9 splitting of the districts breaks up these associations
10 throughout the State in every redistricting cycle, as you just
11 explained.

12 So then we're left with the supplemental briefing
13 information, and we do have from them the assertion that
14 primary turnout is somehow, in gubernatorial election years,
15 is somehow the thing that we should be looking at. But if we
16 look at some of the other data, and this was actually in our
17 origin until summary judgment motion produced, you can see
18 that turnout actually increased in most of these counties. In
19 Frederick there's a percentage decrease, but the number went
20 up. This is general elections, not primaries.

21 And here, let me just -- my pen disappeared. The --
22 this is the Republican turnout difference. So here in
23 Frederick the percentage did go down, but the number of
24 Republicans went up, who voted. Garrett went up, and
25 Washington it went up. We also have evidence that Republican

1 registration went up year over year in all of these counties.

2 So at most we have mixed evidence on any effects of
3 associational harm. And that doesn't necessarily -- it
4 doesn't generate a dispute of material fact, what it does is
5 call into question the causal link that plaintiffs are asking
6 you guys to draw, that there is some causal inference that
7 would be permissible to be made from those 20 -- those primary
8 year -- gubernatorial year primary turnout results.

9 So this defeats the blind assertion that there's
10 some clear causal inference. And what's missing, what the
11 plaintiffs failed to meet the burden to produce, is any expert
12 testimony about turnout, what it meant, if this was a
13 particular effect seen just among Republicans in the 6th
14 District. If it reflected broader trends. That's not our
15 burden to disprove. The plaintiffs needed to come forward
16 with evidence to show that their associational -- their
17 claimed associational harm was in some way connected or caused
18 by the redistricting.

19 Because it's only through that causal link that you
20 guys -- that Your Honors all rec -- or two of this Court, set
21 forth in the decision on the preliminary injunction, that
22 causal link is still very important in this claim. That
23 otherwise we're getting into the realm of not justiciable
24 claims where we have burdens that are felt by the entire
25 state, or burdens that are being felt by members of both

1 parties. So if we don't have the tools, the statistical
2 tools, the expert evidence to distinguish those burdens, then
3 the plaintiffs haven't met their burden of production on those
4 elements.

5 JUDGE BREDAR: It's not enough that they're
6 simply -- that Republicans are divided from each other by a
7 line that was drawn solely for partisan political purposes?

8 MS. RICE: It's not enough because that's not --

9 JUDGE BREDAR: That has to somehow manifest itself
10 in some more detailed consequence than the obvious, which is
11 they cannot associate with each other anymore in the way that
12 is meaningful because they're no longer in the same
13 district.

14 MS. RICE: So it's not enough because of the
15 standing element as articulated by *Gill*, that there has to be
16 some differentiation between plaintiffs and nonplaintiffs. It
17 cannot be enough to establish standing that you've established
18 a burden that occurs in every election to every person that is
19 moved. It has to be something more. I think that --

20 JUDGE NIEMEYER: I don't fully understand, because
21 if -- and I can put it in very course terms that may not be
22 fully satisfied here, but if the government says we are going
23 to target you, Republicans, in this city, and make sure that
24 you don't work together and that your vote doesn't have the
25 full amount, and then they divide them in half, after that

1 statement, don't we have standing to challenge that by the
2 people who are in those -- in that city?

3 JUDGE BREDAR: The Republican people, can I modify
4 it to that extent? The Republican people who are in that
5 city.

6 MS. RICE: That -- I think that the Republican
7 people in that city would have evidence --

8 JUDGE NIEMEYER: Not evidence, do they have standing
9 to challenge the conduct?

10 MS. RICE: They would be able to prove their
11 standing through evidence that that conduct had in fact --

12 JUDGE NIEMEYER: -- the evidence was that the
13 government said we are going to target the Republicans in this
14 city and cut them in half and divide them so as to dilute
15 their vote and to ruin their party. And then they go ahead
16 and they divide the Republicans. Do the Republicans in that
17 city who have been divided and whose vote was diluted have a
18 right to challenge it in a court?

19 MS. RICE: They might have a right under a First
20 Amendment claim that hasn't been brought here. What the
21 plaintiffs have claimed --

22 JUDGE NIEMEYER: I'm not talking about here, let's
23 just get some foundational principles. And you're so
24 reluctant to acknowledge that to me, a straight forward
25 standing case, I tried to make it as clear as I could, and if

1 you reject that I'm not sure what your argument is.

2 MS. RICE: Judge Niemeyer, I think it's important,
3 though, to remember that standing is not dispensed in gross,
4 it's dispensed according to the requisites --

5 JUDGE NIEMEYER: It depends whether the person hurt,
6 as distinguished from the person not hurt, the person hurt can
7 sue the person who caused the hurt. And in this case, the
8 harm the Supreme Court talked about is the disadvantage in the
9 voting opportunity, the diminishment of the voting
10 opportunity. That's the harm. Now, if somebody says I'm one
11 of those persons, the Court should say, okay, let me hear your
12 claim. And we'll look at the evidence then.

13 JUDGE BREDAR: None of the proof in this case is
14 along the lines of we're going to attack voters, we're going
15 to attack Republicans.

16 MS. RICE: Your Honor, I wouldn't submit that any of
17 this proof in this case says anything about attacking
18 anyone.

19 JUDGE BREDAR: We're going to attack the 6th, that's
20 a direct quote from our former governor.

21 MS. RICE: The proof in this case shows that the
22 general assembly and the governor intended to create a
23 competitive 6th District.

24 JUDGE NIEMEYER: Is that a nice way of saying we
25 want to take it away from the Republicans by moving the

1 Republicans out and putting in Democrats. In other words, we
2 want a 7-1 state.

3 JUDGE BREDAR: And if not that, at least we are
4 going to punish Republicans, regardless of vote -- how they
5 vote --

6 JUDGE NIEMEYER: -- organize --

7 JUDGE BREDAR: We're going to interfere with their
8 capacity to associate with each other to achieve their
9 political aims.

10 MS. RICE: Again, this problem now is steering us
11 away the solution that this Court had arrived at to find a
12 claim justiciable and into the realm of nonjusticiable
13 claims.

14 JUDGE NIEMEYER: -- I thought we were talking
15 about --

16 JUDGE RUSSELL: We're steering in the right
17 direction. We just need an answer to the question.

18 JUDGE NIEMEYER: I thought we were talking about
19 standing; right?

20 MS. RICE: Right. Yes.

21 JUDGE NIEMEYER: Okay.

22 JUDGE BREDAR: I'm not going to deny we got some
23 help from Justice Kagan.

24 MS. RICE: That may remain to be seen. I think that
25 it is also worth going a little bit into, back to the vote

1 dilution proof that's been proffered by the plaintiffs. When
2 plaintiffs for the first time in their supplemental briefing
3 attempt to put forward proof of a *Gingles*-type analysis, they
4 do so without the benefit of any expert testimony that is
5 usually the subject of the *Gingles*-type analysis. Actually,
6 Dr. McDonald disclaimed that he was doing the kind of analysis
7 that he would normally do in a racial gerrymandering case,
8 because the data was not available to him. He could not do an
9 ecological inference study about the existence of cohesion
10 voting or block voting.

11 The plaintiffs also get the law wrong when they talk
12 about *Cooper v. Harris*. In that case the State was actually
13 looking to Section 2 district as a justification for what was
14 found to be a racial gerrymander. So the burdens were a
15 little bit different than in your typical Section 2 case.
16 There, the Supreme Court said that the past performance of
17 that district showed the absence of block voting. And then
18 they went on to find that the State had put on no evidence of
19 the proposed district's performance. So here where we didn't
20 have any evidence of the actual district as it performed, the
21 crossover voting, the block voting, it's not enough to rely
22 just on past election results by that same case.

23 I think it might be helpful to look at -- I
24 apologize -- those election results that the plaintiffs did
25 add in their supplemental briefing. Because what's

1 interesting here is in the precincts retained, so these are
2 precincts that they purport to represent to you were in both
3 the old 6th and the new 6th, there's a sharp drop off in
4 Republican voting strength in the 2012 election. In other
5 words, it's evidence that there's crossover voting between
6 Republicans and the Democratic congressional candidate, in
7 this case John Delaney, in that election among the precincts
8 that were retained.

9 You can also see that there's an increase in the
10 precincts that were removed in Republican voting strength.
11 And that makes sense because now those people are in the 8th
12 District. So their choice would be either Representative Van
13 Hollen or Representative Raskin, who were very different
14 candidates from Congressman Delaney, in terms of their
15 political ideology.

16 So these results, insofar as they can mean anything,
17 don't even seem to, by their face, be what the plaintiffs
18 said, because of those different candidates and different
19 elections among these three groups.

20 We also again, don't have any information about
21 exactly which plaintiffs are in which of those groups. The
22 kind of information that seems to be called for by the Supreme
23 Court's action in *Gill* and *Rucho* and that is the kind of
24 information that -- was present in *Rucho* when the Court there
25 moved forward in that case.

1 Also, with regard to the *Gingles* criteria the
2 various threshold requirement, plaintiffs talk about the maps
3 in 1991 and 2001 showing that there was a compact region of
4 Republicans. But those maps are some of the only maps in the
5 entire history of the 6th District that exclude Montgomery
6 County, or in the more recent map extend the 6th District into
7 the eastern part of the state. So they're not very good
8 evidence that there's any compact concentration of Republicans
9 in that area. We just don't have any of that information, the
10 general kinds of proper analyses that would accompany a
11 *Gingles*-type proof.

12 Again, because we're talking about injunctive relief
13 it's important to bear in mind that there have been other
14 times when the Court has been asked to enter an injunction
15 when there's only one election left. And in those cases,
16 especially when there has been delay by the plaintiffs in
17 bringing their claim, like there was in *White v. Daniel*, and
18 there was in this case as acknowledged by the Supreme Court --

19 JUDGE NIEMEYER: Is that the role of a court to say
20 we recognize you have suffered First Amendment injury, but
21 just hold up, you can suffer that injury for another election
22 and then we'll take care of you. That's really what that
23 argument says, doesn't it?

24 MS. RICE: I think what the argument is saying --

25 JUDGE NIEMEYER: In other words, if there's one

1 election where they are going to sustain First Amendment
2 injury, it seems to me that injury should be redressed if it
3 is a First Amendment injury.

4 MS. RICE: I think what the Court in *White* was
5 recognizing is that --

6 JUDGE NIEMEYER: I'm asking you as a general
7 proposition.

8 MS. RICE: I think as a general proposition, either
9 way, the Court might take into account the First Amendment
10 burdens, burdens on other citizens not before this Court, that
11 would accrue were there to be three successive congressional
12 elections under three successive maps. If we're talking about
13 associational injury we have the 2018, 2020, and 2022
14 elections that would be undertaken under different maps,
15 different shape of the district --

16 JUDGE NIEMEYER: Let's make it a little more dicey
17 how about if we have a racial, we find there was a severe
18 racial redistricting and that the plaintiffs were racially
19 diluted. And we say -- you're asking us to say, well, there's
20 only one more election, put up with it, we'll fix it in the
21 next election --

22 MS. RICE: Judge Niemeyer, respectfully I don't
23 think we have to make it more dicey because what we're talking
24 about is invoking the powers of equity.

25 JUDGE NIEMEYER: I understand, but your argument is

1 because there's only one more election, we shouldn't enter
2 injunctive relief. And my point is if there's a violation we
3 should redress it. And there will be another -- there will be
4 another bill down the road, but -- and of course, the outcome
5 of this particular mapping, if we were to change it, would
6 inform future maps and maybe get into something that doesn't
7 raise the same constitutional violation.

8 But I have a little trouble diminishing or demeaning
9 the First Amendment injury, if it is there. They've
10 demonstrated First Amendment injury, it seems to me they
11 should be entitled to a remedy, even if it's only one more
12 election out of five.

13 JUDGE BREDAR: And apart from that, are First
14 Amendment associational injuries only inflicted on election
15 day? Not just the election.

16 MS. RICE: Your Honor, but it would just not be --
17 it would be not just the election for all other members of the
18 public, not just those that are bringing these claims as well.
19 The injunction standard requires this Court to look beyond the
20 merits of the case and to find definitively on the other three
21 prongs, and in doing that laches is a major component of
22 equity. And that's what courts in the 4th Circuit have done
23 in the past --

24 JUDGE NIEMEYER: Well, you've got a point, this
25 thing really has dragged on, but it was filed in 2013, and

1 it's changed shape, it's been to the Supreme Court twice,
2 there's been discovery, there have been motions. It has a
3 procedural history that I think none of us should be proud of
4 as persons in the 3rd branch, but that's a fact of life. It
5 may affect the preliminary injunction, the Supreme Court
6 pointed out that they waited three years I think after filing
7 before seeking a preliminary injunction to stay. But the
8 permanent injunction was asserted in 2013, and we still have
9 an election cycle in front of us.

10 MS. RICE: In *White v. Daniel* the Court was
11 considering a permanent injunction, looked at the equities,
12 looked at the laches that had been displayed by the plaintiffs
13 in this case, and also looked at the harm to the public of
14 successive and frequent redistricting, to find that the
15 equities in that case did not favor entering an injunction for
16 one remaining election.

17 We would submit that that's an instructive and
18 persuasive case, especially given the procedural history here,
19 the uncertainty of the constitutional claims issue, the
20 novelty of those claims to the general assembly, there's no
21 reason to believe that any election in 2022, any map would
22 suffer from the same deficits. And in those cases permanent
23 injunctive relief has been in the past withheld. And so we --

24 JUDGE NIEMEYER: So plaintiffs --

25 MS. RICE: We do think that's an appropriate

1 outcome --

2 JUDGE NIEMEYER: -- so individual plaintiffs who
3 suffer First Amendment rights have to be told we can't remedy
4 your rights, because there are interests of other people who
5 are going to be confused and are going to be having be
6 effected with different maps.

7 MS. RICE: So --

8 JUDGE NIEMEYER: It doesn't quite make sense. It
9 seems to me what you're saying are factors for exercising
10 equity. But I was trying to load the facts up for you to find
11 out how much equity you get. And I'm suggesting that
12 hypothetically, if we find a violation of the Constitution,
13 ongoing and existing, both in the next election and both in
14 the organizational efforts within a political party from now
15 going forward, do we just ignore it? Don't we have an
16 absolute duty to remedy it.

17 MS. RICE: In *Perry v. Judd*, which was another --

18 JUDGE NIEMEYER: Is that yes or no?

19 MS. RICE: I don't think that there is any
20 affirmative duty one way or the other. I think that these are
21 equitable factors that must be found in addition to the
22 merits. So if --

23 JUDGE BREDAR: How can one reasonably even say in
24 Maryland that voters are all that settled in the districts
25 they are in, given the make -- given the appearance of the

1 map? Half the people in the state probably don't even know
2 what district they're in, because you can't look at a map and
3 figure it out without a microscope. So, implicit in your
4 argument is this notion of sort of regularity and the value of
5 the status quo, but there's an argument to be made in contrast
6 with that, that the situation itself in this -- under the
7 current map is so convoluted and susceptible of
8 misunderstanding, the public is not well-served at all by it,
9 in terms of just a fundamental understanding of their role and
10 place in the Democratic process.

11 MS. RICE: The public will have been going to the
12 same polling place, voting in the same set of elections for
13 four successive elections at this point when they go to the
14 polls again in November. So to the extent that redistricting
15 always involves some shuffling of people, that it always
16 involves some confusion, there -- maryland has taken the
17 position that they will redistrict every ten years. And --

18 JUDGE NIEMEYER: And if somebody was hurt during
19 each one of those elections by unconstitutional conduct, but
20 we should not remedy it.

21 MS. RICE: It is certainly --

22 JUDGE NIEMEYER: Because it's been going on for four
23 elections and, therefore, we just discount it.

24 MS. RICE: It is certainly the case that that is
25 what has happened in other cases in the 4th Circuit in the

1 past, that courts have declined to give remedies to plaintiffs
2 that have been dilatory in their pursuit of claims, even First
3 Amendment claims, when elections are at issue, because of the
4 great public interest in the regularity of elections.

5 It is not only that plaintiffs have brought this
6 case late, too late, they have also failed to meet their
7 burden of production. They have not given this court
8 sufficient evidence of causation. They have not -- which and
9 maybe now is a good time to say a little bit about *Hartman v.*
10 *Moore* and *Mt. Healthy*. I think there has been some confusion
11 about what *Mt. Healthy* burden shifting relieves a plaintiff
12 of, even if it were to apply. It's causation that it
13 substitutes for.

14 So that burden shifting substitutes for showing of
15 causation. But it's inappropriate to do that here. It can't
16 substitute for intent or for harm, both of those things still
17 need to be shown under *Mt. Healthy*. It just relieves the
18 party, the moving party, the plaintiffs of showing causation
19 and instead flips the burden to show that the action was not
20 caused by the intent to the State. And it should not be
21 imposed here.

22 *Lozman* clarified that even further last term, by
23 expressly analyzing the facts of that case and saying that the
24 only reason that the Supreme Court would apply *Mt. Healthy* was
25 because the facts in that case showed that there was no

1 distance between the decision maker and the retaliatory
2 action, that the decision maker had, in fact, ordered the
3 retaliatory action. In that case kicking Mr. Lozman out of a
4 public council meeting. They said that if the facts were to
5 develop in some other way that their analysis would not
6 necessarily hold.

7 And it is that other way that we exactly have here,
8 where we have an attenuated causal chain, where there are
9 multiple potential causes and the plaintiffs have simply not
10 given the Court enough aid in disentangling those for
11 inferences to be made about causation. And in that case they
12 have failed to meet their burden and summary judgment should
13 be granted for the State on those grounds.

14 JUDGE NIEMEYER: Okay. Thank you. What I think
15 we'll do, it's better to keep it together. How about if I
16 give you each ten minutes on rebuttal, is that -- can you
17 handle that?

18 MR. KIMBERLY: That would be acceptable, Your Honor.
19 I wonder if I might ask for a restroom break before --

20 JUDGE NIEMEYER: Of course. Why don't we take a
21 five minute break and then we'll allow each side short
22 rebuttal. I'm not going to cut anybody off arbitrarily,
23 because we do want to hear the views of the parties, but I
24 think we're hearing the same thing from both sides again and
25 again. So we'll take a five minute break then.

1 (A recess was taken.)

2 JUDGE NIEMEYER: All right. Mr. Kimberly, I think
3 we're going to start with a ten minute time. And I know down
4 at the Court of Appeals we have little lights that come on,
5 there's an orange light and then there's a red light, you get
6 a ticket if you go through. But we'll start with that for
7 both sides, since there are cross motions here. And if it
8 turns out that something really productive and something new
9 is working we can be a little flexible, but let's start out
10 with a ten minute --

11 MR. KIMBERLY: I appreciate that, Your Honor. And
12 I'll endeavor to be even shorter than that unless the Court
13 has questions. I'd like to start just very quickly, a
14 substantial amount of Ms. Rice's presentation concerned
15 intent. I want just very briefly to rehabilitate a few points
16 on that score. The first is that really the -- there's no
17 question that NCEC was at the heart of the redistricting here.
18 So if you can -- I'm sorry, I don't have my clicker. I'm
19 sorry, just one moment.

20 (Video played.)

21 MR. KIMBERLY: And so it was clear that at least so
22 far as the confessional map was concerned there was
23 predominantly outsourcing to the congressional delegation.
24 That was confirmed by former Secretary of State John Willis
25 and also by sitting Senate President Mike Miller, Mike Miller

1 who said like I told you the map was drawn, it was primarily
2 drawn by the congressional people.

3 Now Ms. Rice showed you a map that she said Eric
4 Hawkins put before the commission and that map doesn't in any
5 way resemble what actually was adopted. In fact, what the
6 evidence shows is Mr. Hawkins drafted some dozen maps. And it
7 was ultimately too broad blue prints that were put before the
8 GRAC. There's the one that you see on the left is the one
9 that Ms. Rice was talking about. And it's true, the GRAC did
10 not proceed with that proposal. The second proposal is
11 Congressional Proposal 2, which also is not precisely what was
12 adopted, but you can see much more closely resembles the
13 blueprint that was adopted.

14 So the GRAC, and really when I say the GRAC, I mean
15 the staffers who were working on this project rejected
16 Congressional Proposal 1, which coincidentally did not have as
17 high EPI as the other one. And this is what we ended up with.
18 This is the adopted map. You can see the close resemblance to
19 the map that had been proposed by Eric Hawkins as one of the
20 dozen or so maps that he drafted.

21 Ms. Rice also suggested that it was unnecessary --
22 or excuse me, there were reasons that it was necessary to
23 fundamentally reshuffle the map in such a way that huge
24 numbers of voters were going to have to be shuffled no matter
25 what. Well, in fact, the only evidence that we have on this,

1 the testimonial evidence, suggests the exact opposite. This
2 is Speaker of the House Michael Busch.

3 (Video played.)

4 MR. KIMBERLY: All right. Unless there are
5 additional questions from the panel on the question about --

6 JUDGE NIEMEYER: Yes, I have one question, is it
7 clear in the record as to the instructions given to Hawkins in
8 drawing the map?

9 MR. KIMBERLY: The record is clear that Hawkins
10 understood that his -- and I can bring up slides if it would
11 be helpful there -- that his directive was to protect
12 Democratic incumbents and otherwise to flip one of the two
13 Republican districts.

14 JUDGE NIEMEYER: All right. Okay.

15 MR. KIMBERLY: And that's in his own testimony.

16 Your Honor, I'm sorry, if I may just very briefly, I
17 meant just to move on. Just briefly to suggest there is no
18 First Amendment right to infrequent redistricting. In fact,
19 there's no reason to think that a state couldn't redistrict
20 every election, that wouldn't be a First Amendment violation.
21 So it's, I think, hard to square that reality with what
22 Ms. Rice was suggesting about frequent redistricting being a
23 First Amendment burden on other voters.

24 And just a point of clarification concerning
25 confusion and the like. Polling places don't change when

1 redistricting changes. And precincts, as a general matter,
2 are fairly stable. They actually change from election to
3 election, occasionally independent of redistricting because of
4 changes in population. But they are relatively stable. So
5 this kind of disruption that Ms. Rice suggested would follow
6 from adopting a new map here I don't think actually holds
7 up.

8 JUDGE BREDAR: What do you say also about the notion
9 that associational harms don't occur only on election day, is
10 there anything to that? That it isn't solely about the impact
11 on how someone votes.

12 MR. KIMBERLY: I wouldn't disagree, Your Honor. I
13 guess as you pointed out, so far as the Constitution is
14 concerned, the question is not whether this effect happens,
15 what makes it an unconstitutional burden is that it's coupled
16 with the specific intent to impose it on a particular segment
17 of the --

18 JUDGE NIEMEYER: I think the question was whether
19 the harm --

20 JUDGE BREDAR: The burden.

21 JUDGE NIEMEYER: The burden caused by damage in the
22 associational right is given effect only at an election, or
23 does it continue on an ongoing basis.

24 MR. KIMBERLY: No, I think it continues on an
25 ongoing basis.

1 JUDGE NIEMEYER: That's because the organizational
2 efforts of the parties.

3 MR. KIMBERLY: That's exactly right. That's exactly
4 right. Thank you, Your Honors.

5 JUDGE NIEMEYER: All right. Ms. Rice.

6 MS. RICE: I will similarly keep this brief and very
7 much related to Mr. Kimberly's presentation. Again, on
8 intent, and this just shows why summary judgment can't be
9 granted on this issue, this is -- I apologize, I don't have
10 the video, but this is Governor O'Malley's deposition. If you
11 go here, Governor O'Malley --

12 JUDGE RUSSELL: Why don't you go ahead and use the
13 ELMO and focus down on it -- that particular portion. There
14 you go.

15 MS. RICE: Talks about how Congressman Hoyer might
16 have come in with a map to which he confessed nobody
17 supported. So when you say I was given a map, I was given a
18 map with the caveat that -- that there's no consensus
19 supporting the congressional delegation for this map.

20 So Governor O'Malley talks about and then the first
21 declaration of Mr. Weissmann, which I didn't bring up with me,
22 but it's Exhibit 11 to our motion for summary judgment, also
23 discusses how there was only one map provided and how they
24 didn't really use it because they didn't think it had
25 consensus and couldn't be used. More specifically, as to the

1 point about Congressional Option 1 and Congressional Option 2,
2 the only evidence that Congressional Option 2 came from NCEC
3 comes from a supplemental declaration of Dr. McDonald upon his
4 examination of some computer files.

5 In our reply we attached the second declaration of
6 Mr. Weissmann, who says that he does not recall receiving
7 anything other than what was attached to his first
8 declaration, that those file names that Dr. McDonald relied on
9 were chosen by him to mark those draft maps as the two main
10 options, and that he didn't use those names to explain that
11 they were from the congressional delegation, but to merely
12 denote that they were congressional maps as opposed to
13 legislature maps, which he was simultaneously drawing the
14 legislative maps, those redistricting processes happen
15 simultaneously in Maryland. That's the continuation of that
16 affidavit.

17 And relying again on Speaker Busch's lack of recall
18 on this issue, which plaintiffs have done a number of times,
19 just goes to show that laches was actually damaging to the
20 pursuit of this case, that people's memories have faded, that
21 they could not recall with specificity what had happened when
22 they were deposed in 2017, their thoughts about this in 2011.

23 And there really are many examples of courts
24 declining to disrupt elections. One of the most famous is
25 *Reynolds v. Sims*, in that case the Court declined to enter an

1 injunction even when it did find a pretty severe violation of
2 constitutional rights. So that is typical in election law,
3 that it is not just the rights of the plaintiffs before the
4 Court, but the interests of the public in the elections.

5 As for whether precincts are redrawn, it really
6 depends if those precinct boundaries need to shift because of
7 the census and the redistricting process, the redistricting
8 time that the State Board of Elections works in concert with
9 the Department of Planning, but it's certainly possible that
10 those precincts shift. Certainly, who is on the ballot would
11 shift for many people.

12 So, with those points, unless the Court has further
13 questions --

14 JUDGE NIEMEYER: Well, thank you very much. And
15 thank both counsel not only for the arguments but for the
16 papers and clear presentations of what this record is.

17 Is there anything further we need to take into
18 account today? Otherwise, we'll take this under counsel and
19 see if three judges can get together and decide something.

20 MS. RICE: Thank you, Your Honor.

21 JUDGE NIEMEYER: Okay. Will you please adjourn
22 court.

23 (The proceedings were concluded.)

24 I, Christine Asif, RPR, FCRR, do hereby certify that
25 the foregoing is a correct transcript from the stenographic
record of proceedings in the above-entitled matter.

_____/s/_____
Christine T. Asif, Official Court Reporter

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